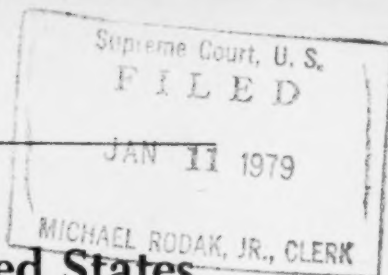


---

**In the  
Supreme Court of the United States.**



OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE  
COMMONWEALTH OF MASSACHUSETTS ET AL.,  
APPELLANTS,  
v.  
HELEN B. FEENEY,  
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS.

**BRIEF FOR THE APPELLEE.**

RICHARD P. WARD  
STEPHEN B. PERLMAN  
ELEANOR D. ACHESON  
JOHN H. MASON  
ROPES & GRAY  
225 Franklin Street  
Boston, Massachusetts 02110  
(617) 423-6100  
JOHN REINSTEIN  
Massachusetts Civil Liberties  
Union Foundation  
68 Devonshire Street  
Boston, Massachusetts 02109  
(617) 742-8040  
*Attorneys for the Appellee*

## Table of Contents.

Question presented	1
Statement of the case	2
I. Prior proceedings	2
II. Facts of this case	4
III. The exclusion from and limitation of women in the United States armed services	12
IV. The history of the Commonwealth's vet- erans' preference statute	16
Summary of argument	19
Argument	22
I. The district court correctly held that the legis- lature's choice of an absolute and permanent form of preference constituted an intentional and purposeful discrimination against women	22
A. The veterans' preference statute consti- tutes intentional and purposeful discrimina- tion against women because it is inherently non-neutral with respect to sex	26
B. The inevitability of the exclusionary im- pact demonstrates a deliberate and inten- tional discrimination against women	31
II. Discriminatory assumptions about the role of women substantially affected the legislators' de- cision to adopt an absolute and permanent form of veterans' preference	37
A. The inference from the historical back- ground of the legislation	39
B. The inference from the legislative and ad- ministrative history	41

C. The inference from the fact that the Massachusetts General Court has consistently been dominated by male legislators	47
III. The defendants failed to rebut the finding that the Commonwealth's choice of an absolute and permanent form of preference constitutes an intentional and purposeful discrimination against women	49
A. The defendants misstate the nature of the proof necessary to rebut a determination of intentional discrimination	49
B. The defendants presented no persuasive proof of any "affirmative action" that rebutted the finding of an intentional and purposeful discrimination	52
C. The defendants equate the ultimate goal of the statute with intent	55
IV. The district court properly invoked and applied the standard of review for statutes that discriminate against women	57
Conclusion	68

## Table of Authorities Cited.

## CASES.

Agnew v. United States, 165 U.S. 36 (1897)	35n
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	64
Alexander v. Louisiana, 405 U.S. 625 (1972)	29, 38n, 55
Anderson v. Martin, 375 U.S. 399 (1964)	30

Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976)	3, 10, 22, 23, 27, 30n, 31n et seq.
Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)	37, 38, 39, 45, 50
Armstrong v. O'Connell, 451 F. Supp. 817 (E.D. Wis. 1978)	35
Arthur v. Nyquist, 573 F. 2d 134 (2d Cir.), cert. denied sub nom. Manch v. Arthur, No. 78-30 (Oct. 2, 1978)	35
Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872)	40
Brown v. Russell, 166 Mass. 14 (1896)	17, 40
Califano v. Goldfarb, 430 U.S. 199 (1977)	38n, 39, 40, 56, 59, 60, 63 et seq.
Califano v. Webster, 430 U.S. 313 (1977)	60
Castaneda v. Partida, 430 U.S. 482 (1977)	11n, 24, 48
Craig v. Boren, 429 U.S. 190 (1976)	24, 36, 39, 59, 61, 64
Cramer v. United States, 325 U.S. 1 (1945)	35n
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977)	37n
Feeney v. Commonwealth, 366 N.E. 2d 1262 (1977)	4
Feeney v. Massachusetts, 451 F. Supp. 143 (D. Mass. 1978)	4, 8, 17n, 22, 23, 25, 26 et seq.
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)	25
Frontiero v. Richardson, 411 U.S. 677 (1973)	36, 38n, 40, 58, 60
Geduldig v. Aiello, 417 U.S. 484 (1974)	30n, 31n
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	30
Goss v. Board of Education, 373 U.S. 683 (1963)	30, 34
Griffin v. Illinois, 351 U.S. 12 (1956)	30

Guardian Association of New York City Police Department v. Civil Service Commission, 431 F. Supp. 526 (S.D. N.Y.), vacated and remanded, 562 F. 2d 38 (2d Cir. 1977)	36n
Guinn v. United States, 238 U.S. 347 (1915)	30
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)	60
Hazelwood School Dist. v. United States, 433 U.S. 299 (1977)	48, 66n
Hernandez v. Texas, 347 U.S. 475 (1954)	38n, 55
Hicklin v. Orbeck, ____ U.S. ____, 98 S. Ct. 2482 (1978)	62, 64
Hunter v. Erickson, 393 U.S. 385 (1969)	41
Johnson v. Robison, 415 U.S. 361 (1974)	63
Kahn v. Shevin, 416 U.S. 351 (1974)	48, 60
Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973)	45, 46, 51
Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972)	57n
Lane v. Wilson, 307 U.S. 268 (1939)	31
Mathews v. Lucas, 427 U.S. 495 (1976)	64
Monell v. Department of Social Services, ____ U.S. ____, 98 S. Ct. 2018 (1978)	34
Monroe v. Board of Commissioners, 391 U.S. 450 (1968)	34
Monroe v. Pape, 365 U.S. 167 (1961)	34
N.A.A.C.P. v. Lansing Board of Education, 559 F. 2d 1042 (6th Cir. 1977), cert. denied, 434 U.S. 997 (1977)	35
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)	35n
NLRB v. Great Dane Trailers, 388 U.S. 26 (1967)	35n
Norwood v. Harrison, 413 U.S. 455 (1973)	57
Nyquist v. Mauclet, 432 U.S. 1 (1977)	63

Owens v. Brown, 455 F. Supp. 291 (D. D.C. 1978)	26n
Radio Officers' Union v. NLRB, 347 U.S. 17 (1954)	35n
Reed v. Reed, 404 U.S. 71 (1971)	56, 61
Regents of University of California v. Bakke, ____ U.S. ____, 98 S. Ct. 2733 (1978)	28n, 60
Reitman v. Mulkey, 387 U.S. 369 (1967)	30
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	38n, 48
Smith v. Allwright, 321 U.S. 649 (1944)	30
Stanton v. Stanton, 421 U.S. 7 (1975)	58, 59
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	30
Trimble v. Gordon, 430 U.S. 762 (1977)	64
Turner v. Fouche, 396 U.S. 346 (1970)	31n
United States v. City of Chicago, 549 F. 2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977)	36n
United States v. Murdock, 290 U.S. 389 (1933)	35n
United States v. Patten, 226 U.S. 525 (1913)	35n
United States v. School District of Omaha, 565 F. 2d 127 (8th Cir. 1977), cert. denied, 434 U.S. 1064 (1978)	35
United States v. Texas Education Agency, 579 F. 2d 910 (5th Cir. 1978)	35
Washington v. Davis, 426 U.S. 229 (1976)	4, 20, 24, 25, 26, 28n, 29 et seq.
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)	56, 60, 67
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	39n, 59, 60, 63

## CONSTITUTIONAL AND STATUTORY PROVISIONS.

## United States Constitution

Article I, § 8 63

Fourteenth Amendment 1, 2, 21, 24, 34, 37, 54n et seq.

## 10 U.S.C.

§ 505 13

§ 505(d) 14

§ 1255 15n

§ 3071 15n

§ 3209 12

§ 3311 14

§ 5575 14n, 15n

§ 5576 14n, 15n

§ 5577 14n, 15n

§ 5581 14n

§ 5582 15n

§ 5584 15n

§ 5586 15n

§ 5587 15n

§ 5590 15n

§ 6911 14n

§ 6913 14n

§ 8257 14n

28 U.S.C. § 2284 2

29 U.S.C. § 158(a)(3) 35n

32 U.S.C. § 325 29n

42 U.S.C. § 1983 2, 3n, 34

P.L. 95-485, § 820, 92 Stat. 1627 (1978) 13n

Civil Rights Act of 1964, Title VII 64

32 C.F.R. § 580.4(b) (1975) 13n

Mass. Gen. Laws c. 4, § 7, cl. 43 7, 29n

## Mass. Gen. Laws c. 31

2n, 41n

§ 2A(e) 44

§ 5 5n, 47

§ 15 10n

§ 21 7

§ 21A 7

§ 23 1, 2, 4, 6, 19, 29n

§ 23B 46

§ 24 47

§ 26 2n, 19

§ 47 5n

§§ 47 et seq. 4n

## Mass. Gen. Laws c. 33

§ 2 29n

§ 11 29n

Mass. Gen. Laws c. 59, § 5 67

Mass. Gen. Laws c. 69, §§ 7, 7A, 7B, 7F 67

Mass. Gen. Laws c. 71 5n

Mass. Gen. Laws c. 75, §§ 14, 24 5n

Mass. Gen. Laws c. 75A, § 11 5n

Mass. Gen. Laws c. 115 67

Mass. Gen. Laws c. 115A 67

Mass. St. 1884, c. 320 16

Mass. St. 1895, c. 501 17

§ 1 17

§ 2 17

Mass. St. 1896, c. 517 17, 42, 46

§ 2 44n

Mass. St. 1919, c. 150 18, 42

§ 2 18, 44n, 46

Mass. St. 1945, c. 725, § 2(e) 46

Mass. St. 1954, c. 627	19, 42
§ 5	19, 42, 43, 46
Mass. St. 1965, c. 53	44, 46
Mass. St. 1971, c. 219	19, 43
Mass. St. 1971, c. 221	44
Mass. St. 1973, c. 692	66
Mass. St. 1974, c. 835, § 109	46
Mass. St. 1976, c. 200	3n
Mass. St. 1977, c. 815, § 2	47
Mass. St. 1978, c. 393	2n
51 Pa. Cons. Stat. Ann. § 7104 (Purdon 1976)	65n
S.D. Compiled Laws Ann. § 3-3-1 (1974)	65n
Utah Code Ann. § 34-30-11 (1974)	65n
Vt. Stat. Ann. Act 20 p. 1543 (1968)	65n

## OTHER AUTHORITIES.

American Law Institute, Restatement (Second) of Torts (1965)	33
Annual Report from the Massachusetts Civil Service Commission, 1973-1974	5n
M. Binkin & S. Bach, Women and the Military (1977)	12n
1 Bishop, Criminal Law (9th ed. 1939)	34
G. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of The Veterans' Preference in Public Employment," 26 Buffalo L. Rev. 1 (1977)	58n, 59, 65

Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 Sup. Ct. Rev. 95	38n
Civil Service Commission 2d Ann. Rep. (1886)	16n
Civil Service Commission 3d Ann. Rep. (1887)	16n
Civil Service Commission 13th Ann. Rep. (1896)	17n
Comment, "Veterans' Public Employment Preference as Sex Discrimination," 90 Harv. L. Rev. 805 (1977)	27
118 Cong. Rec. 54390 (Daily ed. March 21, 1973)	13n
Division of Civil Service, Civil Service Laws and Rules, Form 345, 5M-1-73-075231	46n
Fed. R. Evid. 406	48
Fleming & Shanor, "Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?", 26 Emory L.J. 13 (1977)	30n, 41n, 65n
Holmes, "Privilege, Malice and Intent," 8 Harv. L. Rev. 1 (1894)	33
[1940-1941] National Guard Bureau, Induction of the National Guard of the United States	29n
[1946] National Guard Bureau, Ann. Rep. of Chief	29n
[1950-1956] National Guard Bureau, Induction and Release of Army National Guard Units	29n
Note, "The Equal Rights Amendment and the Military," 82 Yale L.J. 1533 (1973)	12n
Note, "Intent to Segregate: The Omaha Presumption," 44 Geo. Wash. L. Rev. 775 (1976)	36
Note, "Proof of Racially Discriminatory Purpose under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh," 12 Harv. C.R. — C.L. L. Rev. 725 (1977)	35, 36

Note, "Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction," 86 Yale L.J. 317 (1976)	46n
Perkins, "A Rationale of Mens Rea," 52 Harv. L. Rev. 905 (1939)	34
"The Supreme Court, 1974 Term," 89 Harv. L. Rev. 47 (1975)	58n
"The Supreme Court, 1976 Term," 91 Harv. L. Rev. 70 (1977)	59, 61, 64
L. Tribe, American Constitutional Law (1978)	58n
U.S. Department of Labor, Employment Standards Administration, Women's Bureau, Women Workers Today (1973)	13n
2 J. Wigmore, Evidence (3d ed. 1940)	46

# In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE  
COMMONWEALTH OF MASSACHUSETTS ET AL.,  
APPELLANTS,

v.

HELEN B. FEENEY,  
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEE.

Question Presented.

Does Mass. Gen. Laws c. 31, § 23, which excludes women from competitive civil service positions by granting a permanent and absolute preference to veterans, violate the Fourteenth Amendment to the Constitution of the United States?

## Statement of the Case.

### I. PRIOR PROCEEDINGS.

On May 20, 1975, Helen B. Feeney, the appellee here, brought this action in the United States District Court for the District of Massachusetts under 42 U.S.C. § 1983 against the Commonwealth of Massachusetts, its Division of Civil Service, the Director of Civil Service and the members of the Massachusetts Civil Service Commission.<sup>1</sup> The complaint alleged that the plaintiff, a non-veteran woman, had passed the civil service examinations for two administrative positions in state government with high scores, but that she was precluded from consideration for those positions by Massachusetts' absolute veterans' preference formula. She claimed that the statutory scheme, Mass. Gen. Laws c. 31, § 23,<sup>2</sup> and the operative regulations of the Division of Civil Service, violated the Fourteenth Amendment to the United States Constitution and sought an injunction against their enforcement.

With the consent of all parties, the district court entered a temporary restraining order prohibiting the defendants from filling any of the positions sought by the plaintiff. The action was consolidated with a previously filed action challenging the same statutory scheme. A three-judge court was convened pursuant to 28 U.S.C. § 2284 to hear the case. The parties

<sup>1</sup> The position of Director of Civil Service has since been eliminated and its duties transferred to the position of Personnel Administrator of the Commonwealth of Massachusetts.

<sup>2</sup> The civil service laws were recodified by Mass. St. 1978, c. 393. Under the recodification, Mass. Gen. Laws c. 31, § 23, has been replaced by the first and last paragraphs of Mass. Gen. Laws c. 31, § 26. This recodification does not effect any substantive changes in the relevant statutes. For the convenience of the Court, the veterans' preference statute is referred to herein as Mass. Gen. Laws c. 31, § 23. Other references to Mass. Gen. Laws c. 31 are to the sections as they existed prior to recodification.

submitted a lengthy statement of facts in each case describing in detail the Massachusetts civil service system and the history and operation of the veterans' preference statute within that system. The district court also considered the affidavit of the plaintiff, describing her efforts over the years to obtain appointment to various civil service positions, and the affidavit of Edward W. Powers, a former Director of Civil Service and named defendant, in which he conceded that the veterans' preference statute drastically restricts employment opportunities for women in Massachusetts' civil service.

On March 29, 1976, the district court entered an order and opinion awarding judgment in favor of plaintiff Feeney against the named individual defendants.<sup>3</sup> *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) ("*Anthony*") (App. 195). The district court, after carefully reviewing the facts, concluded that the veterans' preference formula, given the virtual exclusion of women from the armed forces, "inescapably" leads to the denial to women of any meaningful opportunity to compete for civil service jobs and held that the statute was unconstitutional.<sup>4</sup>

On August 23, 1976, the Attorney General docketed an appeal (No. 76-265) in this Court on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission. This Court certified to the Supreme Judicial Court of Massachusetts a question relating to the authority of the Attorney General to prosecute the appeal. 429 U.S. 66 (1976). After receipt of the state

<sup>3</sup> The Commonwealth of Massachusetts and the Division of Civil Service were dismissed as parties on the ground that they were not "persons" within the meaning of 42 U.S.C. § 1983.

<sup>4</sup> Following the first decision of the district court, Massachusetts adopted an interim veterans' preference statute. Mass. St. 1976, c. 200, Mass. Gen. Laws c. 31, § 23. (Supp. 1978-1979) (App. to Juris. Statement 51A-53A).

court's response, *Feeney v. Commonwealth*, 366 N.E. 2d 1262 (1977), this Court remanded the case to the district court for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976).

On remand, the district court ordered the parties to file supplementary briefs addressed to the specific question raised by this Court's order of remand and heard oral argument addressed to that question. Upon reconsideration of the entire record, including the legislative and administrative history of the veterans' preference statute and the Commonwealth's past restriction of employment opportunities for women, the district court, on May 3, 1978, reaffirmed its original judgment in favor of Helen B. Feeney and again permanently enjoined the individual defendants from utilizing Mass. Gen. Laws c. 31, § 23 (1971), in filling civil service positions. In its second opinion, *Feeney v. Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978) ("*Feeney*"), the district court concluded that women were intentionally disadvantaged by the Commonwealth's adoption and use of an absolute and permanent preference formula.

Despite the factual finding of a purposeful discrimination against women, the Attorney General again appealed to this Court on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission.

## II. FACTS OF THIS CASE.

As in most states, public employment in Massachusetts is a major sector of the economy. Massachusetts, through its civil service system, is the single largest employer in the state.<sup>5</sup> The

<sup>5</sup>Massachusetts civil service law governs the selection and appointment of municipal employees as well as state employees. See Mass. Gen. Laws c. 31, §§ 47 *et seq.*

civil service system covers appointment to approximately 60 % of all public employment positions.<sup>6</sup> Civil service positions in Massachusetts fall into either of two categories, the classified official service or the classified labor service.<sup>7</sup> In 1975, approximately 90,000 people held positions in the classified official service alone (App. 72). During the ten-year period from July 1, 1964, through June 30, 1974, nearly 200,000 appointments were made to civil service positions (Ex. 63, p. 23). In the fiscal year ending June 30, 1974, over 11,000 appointments were made to positions in the classified official service, and over 6,000 appointments were made to labor service positions (App. 72) (Ex. 63, p. 24).

To attain a permanent position in the classified official service, an applicant must first pass an examination designed to measure relative ability and fitness to perform the duties of the position for which the examination is given.<sup>8</sup> On all examinations, applicants receive appropriate credit for relevant experience obtained in the military service (App. 72-73, 184-185).

<sup>6</sup>The positions which are not covered by civil service include those in cities and towns which have not accepted civil service, Mass. Gen. Laws c. 31, § 47, teachers, Mass. Gen. Laws c. 71, employees of the University of Massachusetts, Mass. Gen. Laws c. 75, §§ 14, 24, and of the University of Lowell, Mass. Gen. Laws c. 75A, § 11, seasonal employees and physicians and other medical personnel, Mass. Gen. Laws c. 31, § 5.

<sup>7</sup>The positions sought by the plaintiff are in the classified official service (App. 72). The veterans' preference statute, however, applies to all civil service positions. The principal difference between the two is that there are no examinations for appointments in the labor service. See Annual Report from the Massachusetts Civil Service Commission, 1973-1974, p. 18 (Ex. 63) (hereinafter "Annual Report").

<sup>8</sup>For certain positions, the examination is an "unassembled" examination, which consists merely of assigned scores based upon the applicant's training and experience. For all other positions, including those which are the subject of this action, the relative grades of the applicants are based on a formula which gives weight both to the results of a written examination and to the applicant's training and experience.

An applicant who passes an examination is placed on an "eligible list." An applicant's position on the eligible list, which is crucial to obtaining a civil service job, is not determined in the first instance by examination score. Rather, the veterans' preference statute, Mass. Gen. Laws c. 31, § 23, requires that eligible candidates be listed in the following order: (1) disabled veterans; (2) veterans; (3) widows and widowed mothers of veterans; (4) all others. Candidates within each category are ranked according to their examination scores (App. 73). The eligible list contains the names of all persons who passed the examination, but, as a practical matter, the selection process limits consideration to those whose names appear at or near the top of the list.

Whenever a public agency has a vacancy in a civil service position, it sends a requisition to the Division of Personnel Administration, (the "Division"), stating the number of vacancies. The Division then "certifies" as eligible those candidates whose names appear at the head of the appropriate eligible list. The number certified is fixed by a formula prescribed by the rules of the Division (App. 73-74). The agency will always receive at least two more names than there are vacancies. For example, where there is one vacancy, the agency chooses from among the top three candidates. The appointing authority is required to make the appointment from among those whose names were certified, but is not required to appoint the person highest on the list (App. 73-75).

An eligible list remains in effect for a maximum of two years. A new examination may be given for that position during the life of the existing list. When this occurs, a new eligible list is established and eligibles on the existing list are integrated into the appropriate preference category in the new list (App. 75).

The preference accorded to veterans by Massachusetts law is available to any person who received an honorable discharge

and who served in the armed forces for at least 90 days of active service, at least one day of which was "wartime" service (the statutory definition of wartime service includes the entire period from September 16, 1940, to May 7, 1975),<sup>9</sup> Mass. Gen. Laws c. 4, § 7, cl. 43, was awarded one of a number of specified campaign badges or the Congressional Medal of Honor, Mass. Gen. Laws c. 31, § 21, or served in certain other specified periods, Mass. Gen. Laws c. 31, § 21A.

In contrast to the five and ten point preferences accorded by the federal veterans' preference scheme, the preference accorded by the Commonwealth to veterans who pass qualifying examinations is absolute. Veterans who pass the examination must be considered ahead of all other eligible persons regardless of score. Moreover, the Commonwealth's veterans' preference law has no time or use restrictions: the preference is available to a veteran for his entire working life; and it may be invoked by a veteran as many times as he wishes to seek employment or a different position in the classified service.<sup>10</sup>

Approximately one year prior to the institution of this action, Massachusetts instituted a new civil service policy to give "banded" examinations. Under this policy, the Division gives a single, state-wide examination for each entry-level job classification rather than separate departmental examinations for the same classification. Prior to banding, the eligible list for a particular position within a department could be quite short. Where the examination for that position is "banded" with similar positions in other departments, the eligible list

<sup>9</sup> A veteran who served between February 1, 1955, and August 4, 1964, must have completed 180 days of active service to be eligible for the preference.

<sup>10</sup> As a result, the principal beneficiaries of the preference are older veterans. See, e.g., Ex. 8 (App. 150-151).

may include hundreds of candidates, many of whom will be veterans (App. 183-184).

The district court found that Massachusetts' absolute veterans' preference formula inescapably causes a "devastating impact" on the employment opportunities of women in the Commonwealth's service, 451 F. Supp. at 149 (App. 262). The consequences described by the district court flow inexorably from the facts that: (i) the selection process used by Massachusetts requires appointment of one of those few persons whose names appear at the top of the eligible list (App. 74); (ii) the veterans' preference statute requires that eligible veterans be placed on the list ahead of all others, regardless of score; and (iii) veterans are almost invariably men, and nearly half of Massachusetts' men are veterans.<sup>11</sup>

The record in the district court demonstrates the exclusion of women by the absolute preference formula.

The plaintiff, Helen B. Feeney, is a 56-year-old female citizen of the Commonwealth and is not a veteran. She worked for the Commonwealth as a Senior Clerk Stenographer in its Civil Defense Agency from 1963 to 1967 and as Federal Funds and Personnel Coordinator from 1967 to 1975 (App. 83, 175-177). Mrs. Feeney has taken and passed nine civil service examinations. Although over the last ten years she has reviewed the civil service notices of examinations, she did not apply and take examinations for many attractive positions because she considered those steps futile in light of the veterans' preference statute (App. 177-181).

<sup>11</sup> More than 98 per cent of all veterans in the Commonwealth are men and nearly 47 per cent of Massachusetts men over 18 are veterans, whereas only 1.8 per cent of the Commonwealth's veterans are women and only 8/10 of 1 per cent of the Commonwealth's women over 18 are veterans (App. 83). Thus, the preferred "veteran" characteristic appears 60 times more frequently among working-age men than among such women.

On February 6, 1971, Mrs. Feeney took an examination for the single position of Assistant Secretary, Board of Dental Examiners. She scored 86.68 (the second highest), but the application of the veterans' preference statute advanced five male veterans, four of them lower-scoring, ahead of her, causing her to be ranked sixth on the eligible list (Ex. 61). Thus, Mrs. Feeney was not even certified for appointment.<sup>12</sup> A male veteran with an examination grade of 78.08 was certified and appointed (App. 82-83).

On February 24, 1973, Mrs. Feeney took an examination for the single position of Head Administrative Assistant, Solomon Mental Health Center. She received a score of 92.32 (the third highest) but the application of the veterans' preference advanced ahead of her 12 male veterans, 11 of whom were lower-scoring, reducing her status to 14th on the eligible list (Ex. 2). Again Mrs. Feeney was not certified as eligible because of the preference and was not considered for the position (App. 107, 178). On or about May 18, 1974, Mrs. Feeney took an examination for Administrative Assistant positions. Although she scored 87, which would have tied her for 17th place on the list, the veterans' preference statute caused her to be ranked 70th behind 64 veterans, 63 of whom were men and 50 of whom had lower scores (App. 132-149, 179). Although no appointments were made to any of the positions to be filled from this list prior to the May 23, 1975, entry of a restraining order in this case (App. 77-78), Mrs. Feeney's opportunity to be certified and considered for appointment to these positions was virtually eliminated because of the veterans' preference (App. 179-180).

<sup>12</sup> The Rules of the Civil Service require certification of three names where there is a single vacancy (App. 73-75). Thus, with the second-highest score and without the application of the veterans' preference, Mrs. Feeney would have been certified for consideration for this position.

Mrs. Feeney's experience was typical of that of the women on the list. Of the 135 men on the Administrative Assistant list (App. 132-149), 63 (47 per cent) received the preference while only one (2.5 per cent) of the 41 women so benefited. Without the preference, 16 of the women (nearly 40 per cent) would have ranked in one of the top 64 places now occupied by veterans (the approximate top third of the list); with the preference, the number of women among the top 64 places is one rather than sixteen. Thirty-seven of the 41 women on the list were, by virtue of the preference, ranked below male veterans who received lower scores. This realignment of the Administrative Assistant list pursuant to the absolute veterans' preference formula meant that virtually all of the women on the list, regardless of scores, would not be certified for appointment. At the time that the list was established, there were 43 positions that could have been filled from this list<sup>13</sup> (App. 77). As these positions would be filled from those whose names appear at the head of the list, non-veterans could be considered only in the event that virtually all the veterans declined appointment.

The Counsel I list at issue in *Anthony* shows the same pattern. But for application of the preference, nearly half the women (13 of 27) would have ranked in the top 76 places (the approximate top third of the list) now occupied by veterans; the application of the preference totally eliminated women from these top 76 places. Ms. Anthony, whose examination score of 94 was the highest received by any applicant and would have placed her second on the list, was reduced to 77th place behind 73 male veterans who received lower scores and three who received the same score.

<sup>13</sup> The 43 positions were those held by provisional appointees. Massachusetts law provides that a provisional appointment to fill a civil service position shall be terminated within 30 days after the establishment of an eligible list for such position. Mass. Gen. Laws c. 31, § 15.

The exclusion of women demonstrated in the four lists discussed above is by no means an aberration, but is, rather, the inevitable consequence of the preference. Exhibits 13-62 are 50 eligible lists that have been stipulated by the parties as "examples" (App. 80), and they strongly confirm the exclusion of women worked by the preference. Every one of the lists includes one or more women who, by application of the veterans' preference, were ranked below male veterans with lower scores and were thereby deprived of a certification for appointment which they would have had but for the application of the preference<sup>14</sup> (App. 80).

As appellants have noted, women have not been entirely excluded from the classified official service: 43 % of permanent appointments over a recent 10-year period have been women (App. 79). This statistic, however, must be considered together with the fact that 56 % of the qualifying candidates for permanent appointment during the same period have been women (App. 174), reflecting a disparity of 13 %.<sup>15</sup>

The Commonwealth has conceded that, for the "many permanent positions for which males and females have competed, the application of the Veterans' Preference Statute has resulted in a substantially greater proportion of female eligibles than male eligibles not being certified to appointing authorities for appointment to permanent positions" (App. 80). This acknowledgment is echoed in the testimony of Edward W.

<sup>14</sup> Indeed, in 47 of the 50 lists, one or more women whose examination scores rank them among the top three places on their respective lists are reduced in relative ranking by application of the absolute preference. In 32 of the 47, such women are totally eliminated from the top three places on their respective lists.

<sup>15</sup> Utilizing the method of analysis set forth in *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), this disparity of 13 % is equivalent to more than 56 standard deviations, a figure far in excess of the "two or three" said by this Court to raise an inference of discrimination.

Powers, former Director of Civil Service, who occupied that position as one of the original defendants in this case:

"... Women will continue to be employed primarily in the relatively low-paying entry-level clerical positions for which men traditionally do not apply. However, for the relatively high-paying Civil Service positions, such as programmers, planners, psychologists, doctors, administrative assistants, head administrative assistants, etc., the continued use of the Veterans' Preference Statute will result in few, if any, female eligibles being considered and appointed to such positions." Ex. 83 (App. 184).

### III. THE EXCLUSION FROM AND LIMITATION OF WOMEN IN THE UNITED STATES ARMED SERVICES.

That more than 98 % of those who qualify for veterans' preference are men is a direct result of the fact that during the years from 1940 to 1975 — the period of wartime service qualifying Massachusetts veterans for the preference — a variety of federal statutes and regulations severely restricted participation in the military by women, barring altogether service by many women, erecting barriers to enlistment by others and sharply restricting opportunities for those who were enlisted.<sup>16</sup>

*Entrance criteria.* Until November 18, 1967, women could not exceed 2 % of the total military personnel in the armed forces, by statutory bar. The Army continued to maintain a 2 % limitation of the Women's Army Corps (WAC) by regula-

<sup>16</sup> App. 84-92. Exs. 90-168. See generally, M. Binkin & S. Bach, *Women and the Military* (1977) pp. 6-13; Note, "The Equal Rights Amendment and the Military," 82 *Yale L.J.* 1533 (1973).

tion until 1978.<sup>17</sup> These restrictions have operated despite the fact that by 1973 85 % of all military jobs were non-combatant in nature.<sup>18</sup>

In addition to the absolute limitation of women personnel, various enlistment and appointment criteria have been more stringent for women than for men. Men could enlist at age 17 but, until 1974, women were prevented by statute from enlisting until age 18 (10 U.S.C. § 505 (1975); Exs. 100-104, 108-110, 155) and, until recently, parental consent for enlistment was required of women under 21 but of men only under 18 (App. 85). Women who sought to enlist were subjected to higher mental aptitude, educational and physical requirements (Exs. 93, p. 14; 100-104, 107-110, 123, 154) and have been subjected to more extensive application and screening procedures (Exs. 99, 101, 108, 109, 123), including requirements of personal references and attractive appearance (Exs. 99, 101, 108, 109, 123) and that they not have minor children.<sup>19</sup>

Women have faced similar barriers in the special sources of officer procurement. They were not admitted to the three major military academies (App. 84-85), or permitted to participate in the college-level Reserve Officer Training Corps

<sup>17</sup> 32 C.F.R. § 580.4(b) (1975). The Women's Army Corps was abolished in October, 1978. P.L. 95-485, § 820, 92 Stat. 1627 (1978). Other restrictive statutes cited herein may also have been modified or withdrawn since 1975 when the class of veterans eligible for the absolute preference was closed.

<sup>18</sup> 118 Cong. Rec. 54390 (Daily ed. March 21, 1973).

<sup>19</sup> Until the 1970's, the armed services prohibited the enlistment and appointment of married women and women with children younger than 18, while similarly situated men were not so excluded (App. 85; Exs. 99, p. 2; 98, 103, 104). Since approximately 60 % of women in the workforce are married (Ex. 93, p. C-1; U.S. Department of Labor, Employment Standards Administration, Women's Bureau, *Women Workers Today* (1973)), this exclusionary rule alone has had the effect of rendering a majority of women ineligible for veterans' preference under state veterans' preference statutes.

(ROTC). Women who sought direct appointment<sup>20</sup> were subjected to more rigorous selection criteria than men with respect to education, physical standards, educational attainment, and special application procedures which have included personal references and statements (Exs. 96-99).<sup>21</sup>

*Training and Job Opportunities.* Women in the military found far fewer opportunities than were accorded men. Women in the Army were assigned to the Women's Army Corps, while men could express preference for and be assigned to any of approximately 21 branches (10 U.S.C. §§ 505(d) and 3311; Exs. 96-98, 107-109, 117). Until the early 1970s, only approximately 180 Army "Military Occupation Specialities" (MOS) were open to women while some 500 were available to men (of these 180, 43 were open only during periods of mobilization, 77 were clerical or clerical/technical classifications, and 18 were musical band classifications) (Exs. 111-115). Predictably, nearly 95 per cent of Army enlisted women in July 1972 were in medical and administrative classifications (Ex. 93, pp. 26-28). Women were not permitted, under Army policy, to command men (Ex. 92, p. 2). The Navy, Marine Corps and Air Force had similarly limited opportunities for women.<sup>22</sup> Few women have risen to high-level military staff positions (Ex. 94, 6-page untitled chart).<sup>23</sup>

<sup>20</sup>The opportunities for such appointment in the Navy and Marine Corps were statutorily restricted. 10 U.S.C. §§ 5575-77, 5581, 6911, 6913, 8257.

<sup>21</sup>For example, women but not men were held to requirements of "looks, figure and personality" for assignment to "high level staff" positions in the Washington, D.C., area (Ex. 168, pp. B-10, 11, 21; A-10; C-3).

<sup>22</sup>See Ex. 93, pp. 25-28, and Ex. 94: "United States Air Force, Officer Strength with Breakout of Women Nurses/Medical Service and Line Offices," and "United States Navy, Distribution of Personnel."

<sup>23</sup>U.S. Representative Otis Pike at a 1972 Congressional hearing on military strength said of the then existing restrictions on women in the armed forces: "The notion seems to exist in the military that women are nothing but defective men" (Ex. 90, p. 12485).

*Advancement Opportunities.* As members of the WAC, women's opportunities to advance in rank within the Army were severely limited.<sup>24</sup> Until November 1967, the highest position to which Army women could aspire was that of the one full colonel who served as WAC Director.<sup>25</sup> Not until 1970 was the first woman appointed to the rank of general in any of the military services, and there were only five such women as of January 1974 (Ex. 92, p. 1). Promotional opportunities for women were limited by their ineligibility for many career-advancing assignments. Women officers in the military have been largely excluded from the senior service schools (e.g., the Command and General Staff College, the Army War College, the Naval War College) to which male officers were sent for advanced training.<sup>26</sup>

*Separation.* Until 1967, the statute required women to retire at an earlier age than men.<sup>27</sup> Women were subjected to a variety of stricter rules for termination within the military than were men.<sup>28</sup>

<sup>24</sup>Women in the Navy and Marines were also appointed under separate statutory sections, confined to the lowest ranks and limited in their assignments, transfers and promotions. 10 U.S.C. §§ 5590, 5575, 5576, 5577, 5582, 5584, 5586, 5587 (1975).

<sup>25</sup>Ex. 92, p. 1; 10 U.S.C. § 3071 (1975).

<sup>26</sup>The significance of women's exclusion is reflected in the fact that 95 % of the Army's generals as of August 1, 1973, had attended a war college. Ex. 92, p. 1; 94, "United States Army, Military Education Level of General Officers."

<sup>27</sup>10 U.S.C. § 1255 (1967).

<sup>28</sup>Military regulations required the discharge of women who became pregnant or who became the parents of children less than 18 years of age (Exs. 124-127, 133-138, 144-152). Women were also discharged for failure to meet minority and parental consent requirements to which men were not subject (Exs. 130-132). Female nurses and warrant officers were mandatorily retired at younger ages than male officers and warrant officers (Exs. 128, 129).

#### IV. THE HISTORY OF THE COMMONWEALTH'S VETERANS' PREFERENCE STATUTE.

The first civil service statute in the Commonwealth, enacted in 1884, Mass. St. 1884, c. 320, provided a form of veterans' preference without specific reference to sex. However, the Civil Service Commission rules implementing the statute indicated that personnel requisitions could be made on the basis of sex<sup>29</sup>:

"In case the request for any such certification, or any law or regulation, shall call for persons of one sex those of that sex shall be certified; otherwise sex shall be disregarded in certification." (Civil Service Rule XIX(3).)

<sup>29</sup> Contemporaneous legislative history makes clear that this rule was designed to allow women to be requested expressly for clerical positions. In 1886, vetoing a bill to permit appointment of veterans without regard to civil service rules, the governor characterized as jobs "for which the veterans would not under any circumstances be available" those in "the clerical service for which women were wanted." Civ. Serv. Comm. 2d Ann. Rep. (1886) at 108. In 1887, in its Third Annual Report, the Civil Service Commission expressly addressed the subject of the appointment of women:

"APPOINTMENT OF WOMEN. The clerical service of Massachusetts and her cities is open under the Civil Service Rules to both sexes. It has long been proved that for many of the clerical positions in the public service women are at least as well qualified as men. For these positions, during the year, 109 women were examined, of whom 83 passed and 17 were appointed. In the same branch of the service 37 men were appointed. The Commissioners make no distinction between the sexes in certifying names for appointment. Unless the requisition calls for persons of one sex, names of both sexes, or either sex, according to the standing upon the eligible list, are certified. Any inequality in the number of men, arises either from the necessities of the service or the personal preference of appointing officers." Civ. Serv. Comm. 3d Ann. Rep. at 23 (1887).

In 1895, the Massachusetts legislature passed the first complete veterans' preference statute, Mass. St. 1895, c. 501. The statute provided an absolute preference for veterans who had been examined and found qualified for appointment and stated "nothing herein contained shall be construed to prevent the certification and employment of women." *Id.*, § 1. Section 2 of the statute provided for an absolute preference for all veteran applicants for employment over "all other applicants, not veterans, except women . . ." <sup>30</sup> The absolute preference provided by § 2 of the 1895 statute was challenged under the Massachusetts Constitution in *Brown v. Russell*, 166 Mass. 14 (1896). The court held that an absolute preference for veterans, without regard to their meeting at least minimum qualifications for appointment, was unconstitutional.

In 1896, the legislature first adopted the absolute veterans' preference formula which without substantial changes in its design has remained in effect until the present. Mass. St. 1896, c. 517. Pursuant to this preference statute, Civil Service Rule XXVII(1) provided for single-sex requisitions<sup>31</sup>:

<sup>30</sup> The district court noted that "[a]lthough the 1895 statute on its face appears to exempt women from the operation of the veterans' preference with respect to all available jobs, the prior and subsequent legislative history suggest that the statutory language was merely consistent with the pre-existing rule permitting single sex lists. See Civil Service Rule XIX(3) promulgated pursuant to Stat. 1884, ch. 320. . . . Statistics show that the exemption operated only to preserve stereotypically 'female' clerical jobs for women." 451 F. Supp. at 148 n.9 (App. 260-61).

<sup>31</sup> The 1896 statute may have increased the appointment of women, but only with respect to "clerical service": The Thirteenth Annual Report stated:

"There were 134 more women examined than during the previous year, showing the still growing desire of women to seek employment under the present civil service system, and the inclination of appointment officers to employ them in the clerical service. This inclination may be partly due to the veteran preference provided by the present legislation." Civ. Serv. Comm. 13th Ann. Rep. at 6 (1896).

"Whenever any officer or board having the power of appointment to any office or employment under these rules shall make requisition not expressly calling for women, the commissioners shall certify the names of all veterans who have passed the examination for the position sought, in the order of the respective standing of such veterans upon the list; in case such officer or board shall in the requisition request the certification of women, then the commissioners shall certify the names of the three most eligible women upon the list."

In 1919, a substantive reenactment and reaffirmation of the policy of using an absolute and permanent form of preference was passed to benefit World War I veterans. Mass. St. 1919, c. 150. This statute, *inter alia*, adopted the language of Rule XXVII(1) concerning "female" requisitions and applied the veterans' preference to all requisitions which did not especially call for women. The relevant language of § 2 provided as follows:

"The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the respective eligible lists in the order of their respective standing, above the names of all other applicants, and upon receipt of a requisition not especially calling for women, names shall be certified from such lists according to the method of certification prescribed by the civil service rules applying to civilians."

In 1921, the veterans' preference provision was recodified in chapter 31 of the General Laws, perpetuating the allowance of single-sex requisitions. Rule 13 of the amended Civil Serv-

ice Rules authorized the Commissioner to respond to a requisition designating sex, stating in part that "[w]henver any appointing officer shall make requisition, the Commissioner shall certify from such list as he shall deem suitable, and may recognize the qualification of sex if so stated in the requisition."

The final and most recent legislative reaffirmation of the policy to utilize an absolute and permanent form of preference occurred in 1954 when the legislature enacted substantial revisions and extended the absolute preference to veterans of the Korean war. Mass. St. 1954, c. 627. In addition to reenacting an absolute form of preference which could be used repeatedly throughout the lifetime of a veteran, the statute continued to reflect the legislative authorization for sex-specific requisitions by exempting the absolute preference in the case of "receipt of a requisition not especially calling for women." Mass. St. 1954, c. 627, § 5. The present form of the preference is virtually identical to that enacted by the legislature in 1954.

In 1971, the legislature deleted the language in the statute which made the preference inapplicable to requisitions especially calling for women, Mass. St. 1971, c. 219. In 1978, an overall recodification of the civil service laws was enacted with no substantive changes with respect to the form of absolute preference. Rather than appearing in Mass. Gen. Laws c. 31, § 23, the absolute preference formula is now codified in Mass. Gen. Laws c. 31, § 26.

#### Summary of Argument.

Massachusetts accords an absolute and permanent preference to veterans seeking civil service employment. It is absolute in that all veterans who pass the qualifying examination must be considered ahead of all other eligible persons regard-

less of score. It is permanent in that it may be used any number of times for any number of jobs throughout a veteran's lifetime. Because women were barred by law from the military service, the result of this extreme form of preference is that women, no matter how well qualified, are systematically barred from civil service positions whenever they compete with men. Women are thus relegated to those traditionally "female" jobs which are shunned by men. The absolute and permanent preference produces and perpetuates occupational sex-segregation in the civil service system.

The effects upon women caused by the adoption of the absolute and permanent form of preference were intentional and purposeful for two reasons that distinguish it from the neutral writing test at issue in *Washington v. Davis*, 426 U.S. 229 (1976). First, the veterans' preference statute is inherently non-neutral with respect to women, because it incorporates into the hiring process for public service jobs decades of *de jure* discrimination against women by the military services. Second, the discrimination against women was inevitable. When the absolute and permanent form of preference was adopted, it was known to a certainty that its use would exclude women from every civil service position of interest to men. The preferred class is one that by law is closed to women.

While analysis of the objective factors conclusively demonstrates that the exclusionary effects on women were intentional and purposeful, the legislative history and background also show that the choice of the extreme form of preference was prompted by and premised upon the assumption that women would not or should not compete with men for upper-level positions. Rather, the legislators assumed that women would only be interested in and suitable for the traditional "female" jobs of a secretarial or clerical nature.

The defendants did not rebut the evidence of purposeful and intentional discrimination. There was no clear and con-

vincing evidence that the choice of this form of preference was free from the taint of discriminatory factors. Nor is it sufficient merely to point to the legitimate purpose of aiding veterans. The ultimate objective of the statutory scheme does not absolve the Commonwealth of the intended consequences of the specific means — an absolute and permanent preference — which it chose to attain its objective. The Commonwealth showed no actual affirmative action to mitigate the effects of the extreme preference on women.

After finding that the preference intentionally discriminates against women, the district court properly examined the statute to determine whether it is substantially related to the achievement of an important governmental objective. This correctly included an examination of the specific means selected by the state. The Commonwealth failed to meet its burden to demonstrate any convincing rationale for an extreme form of preference as a means to aid veterans. In fact, the preference does not closely serve the goals asserted in support of it by the Commonwealth, and more tailored methods exist which would substantially better serve these goals without systematically excluding women competing for upper-level civil service positions.

Therefore, the absolute and permanent form of preference which was premised upon and perpetuates overbroad assumptions about the "suitable" roles of women in the job market denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment.

### Argument.

#### I. THE DISTRICT COURT CORRECTLY HELD THAT THE LEGISLATURE'S CHOICE OF AN ABSOLUTE AND PERMANENT FORM OF PREFERENCE CONSTITUTED AN INTENTIONAL AND PURPOSEFUL DISCRIMINATION AGAINST WOMEN.

The Commonwealth of Massachusetts operates a civil service system that is segregated by sex. Men occupy the upper-level, higher-paid positions of responsibility,<sup>32</sup> while women are relegated to the less responsible, primarily clerical and ministerial positions. "[A]s is conceded by all parties, . . . female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied. Few, if any, females have ever been considered for the higher positions in the state Civil Service." 415 F. Supp. at 498 (App. 218); *see also* the stipulated testimony of the Director of Civil Service (App. 184).

This "clear pattern of exclusion of women from competitive civil service positions,"<sup>33</sup> 451 F. Supp. at 149 (App. 263), re-

<sup>32</sup> The defendants offered no evidence whatsoever that any significant number of women are, in fact, employed in upper-level jobs in the civil service system.

<sup>33</sup> While 56 per cent of the applicants eligible for appointment in a ten-year period were women, only 43 per cent (20,211) of the actual appointees (47,005) were women (App. 79, 174), and a significant percentage of these women "served in lower grade positions for which men traditionally did not apply." 451 F. Supp. at 149 (App. 262). In relying on this 43 per cent figure, *see* Brief for the Appellants, p. 43, defendants are not only oblivious to applicant/appointee ratio but also ignore the crux of this case: that the adoption of an absolute and permanent form of preference inevitably excludes women from positions for which they must compete with men, including the upper-level positions which are the most desired in state service. Indeed, their argument appears to be premised on the stereotypic assumption that a woman should not be seeking an upper-level job, but should be satisfied instead to obtain a lower-level, clerical position.

sults inexorably from the absolute and permanent form of veterans' preference. More than 98 per cent of all veterans in the Commonwealth are men, and only 1.8 per cent of such veterans are women (App. 83). Moreover, 47 per cent of all men in Massachusetts over the age of 18 are veterans (in contrast to 0.8 per cent of all such women) (App. 83), and male veterans eligible for the absolute preference throughout their lifetimes apply for virtually every upper-level civil service position. *See, e.g.*, Exhibits 13 through 62. Since, "[a]s a practical matter . . . the Veterans' Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list," 415 F. Supp. at 488-489 (App. 198); 451 F. Supp. at 145 (App. 254), male veterans hold virtually every significant civil service appointment in Massachusetts. Because women were barred from becoming veterans, the absolute preference benefits "an already established class," 451 F. Supp. at 151 (App. 268) (Campbell, J., concurring), consisting almost entirely of men,<sup>34</sup> and virtually every woman is barred from positions of interest to men.

As the district court found, the absolute preference formula inescapably has a "devastating impact" on the employment opportunities of women. 451 F. Supp. at 149 (App. 262). It operates to make "upper-level state employment a male preserve," *see* 451 F. Supp. at 151 (App. 267) (Campbell, J., concurring), and effects a "near blanket, permanent exclusion of all women from a major sector of employment." *See* 415 F. Supp. at 501 (App. 226) (Campbell, J., concurring).

The Commonwealth asserts that it may not be held to have intended these drastic effects on women unless there is direct evidence that at the time they enacted the veterans' preference statute, the Commonwealth's legislators were subjectively

<sup>34</sup> When the preference was first enacted in 1896, the class entitled to the preference consisted entirely of men.

motivated by an "anti-female animus"<sup>35</sup> or a "desire to harm women."<sup>36</sup> In essence, the Commonwealth is saying that a state may consciously adopt a non-neutral selection classification for public jobs which inevitably and inescapably operates to exclude one sex, and then avoid heightened scrutiny of this classification on the ground that no discrimination against the group was intended. There is nothing in this Court's opinion in *Washington v. Davis*, 426 U.S. 229 (1976), or in any other decision, that supports such an extreme view of what constitutes proof of intentional and purposeful consequences. Proof of subjective ill-will or malice toward a particular group is simply not required by *Davis*. In fact, any requirement of such proof would be particularly inappropriate in sex discrimination cases because, as this Court has repeatedly emphasized, the nature of invidious sex discrimination is not so much a desire to disadvantage or harm women for its own sake, but rather an overriding insensitivity or indifference to their legitimate interests based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig v. Boren*, 429 U.S. 190, 198-199 (1976).

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court confirmed the fundamental proposition that a statute which is neutral on its face should not be held invalid under the Equal Protection Clause of the Fourteenth Amendment solely because it has been shown to have a disproportionate impact on a suspect group or class. Rather, there must be an additional showing that the effects upon the class were intentional and purposeful. The discrimination must be shown to be deliberate and purposeful as opposed to incidental or accidental. *Castaneda v. Partida*, 430 U.S. 482, 494 n.13 (1977).

<sup>35</sup>Jurisdictional Statement, p. 16.

<sup>36</sup>Brief for the Appellants, p. 41.

Proof that consequences are intentional and deliberate has never been limited solely to direct proof of subjective states of mind to determine the "desires" of legislators. Such an inquiry is both difficult and limited in usefulness. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

Rather, as this Court recognized in *Davis*, the pertinent inquiry is to examine all the facts and circumstances to determine whether the effects on the class are intentional and purposeful. A first step is to examine, regardless of facial appearances, whether the selection criterion — the veteran classification — is inherently and substantively neutral with respect to gender.<sup>37</sup> If it is not, then a finding of intentional discrimination should follow, just as if there were an explicit reference to gender on the face of the statute. Second, the inquiry should focus on whether the choice of an absolute and permanent form of preference inevitably causes one particular class to be excluded.<sup>38</sup> If it does, then the exclusion is deliberate and intentional under any reasonable construction of those terms.

The district court examined and analyzed the "totality of the relevant facts," 451 F. Supp. at 147 (App. 259), and concluded that the Commonwealth of Massachusetts had "... intentionally sacrific[ed] the career opportunities of its women in order to benefit veterans . . ." 451 F. Supp. at 150 (App. 265). Its conclusion was properly based on objectively verifiable facts and circumstances that warrant a finding of intentional and purposeful discrimination.

<sup>37</sup>For example, the writing test in *Davis* was inherently and substantively "neutral" with respect to blacks because it was not "culturally slanted to favor whites." *Id.*, 426 U.S. at 235.

<sup>38</sup>In *Davis*, the exclusionary effects of the test were not inevitably caused by the test because both blacks and whites have equal opportunity to acquire writing skills. See 451 F. Supp. at 151 (App. 267) (Campbell, J., concurring).

A. *The Veterans' Preference Statute Constitutes Intentional and Purposeful Discrimination Against Women Because It is Inherently Non-Neutral with Respect to Sex.*

Unlike the personnel test in *Davis*, which established "a racially neutral qualification for employment," 426 U.S. at 245, because it was not "culturally slanted to favor whites," *id.* at 235, the absolute veterans' preference formula is "substantively non-neutral" with respect to sex, 451 F. Supp. at 152 (App. 269) (Campbell, J., concurring). The selection criterion — veteran status — is structurally non-neutral with respect to sex because it is inextricably intertwined with laws and regulations that substantially barred or discouraged women from military service.<sup>39</sup> As the district court found, "[t]he selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility

<sup>39</sup> Whether or not these regulations violated the constitutional rights of either women or men is not at issue in this action. However, *see Owens v. Brown*, 455 F. Supp. 291 (D. D.C. 1978), which found at least some restrictions on women by the military to be unconstitutional and which case was not appealed by the federal government. What is relevant is that they indisputably discriminated against women as to initial enlistment and officer recruitment and as to career and advancement opportunities within the services.

The defendants ignore both the fact and the importance of this discrimination when they suggest that the "reasons for the lack of women in the military were social in nature." *See* Brief for the Appellants, p. 36. The persistent and pervasive nature of these discriminatory regulations provides a compelling basis upon which to conclude, as did the district court, that they were largely the reason for the absence of significant numbers of women in the military. Indeed, the plaintiff's experience is illustrative. During World War II, when she inquired as to military enlistment at the age of 18, she was told that, as a woman, she needed parental consent (App. 180), which her mother declined to give. She was told that there were more rigorous physical requirements for women than for men (App. 180). Finally, because she married and had children, she (unlike men) was absolutely barred from the military for at least the 19 years from 1952 through 1971 when she had minor children (App. 175).

of women for participation in the military." 451 F. Supp. at 145 (App. 254). Until 1967, federal law established a 2 per cent quota for women personnel in the armed forces, and the Army — the largest of the armed services — continued to adhere to such a quota. Furthermore, until the 1970's, the armed services prohibited the enlistment of married women, but not of married men. Federal regulations also prohibited the enlistment of women with minor children, but not of men with minor children. While women could not enlist until age 18, and parental consent was required until age 21, men could enlist at 17, and parental consent was required only until age 18. Women were also subjected to more rigorous mental and physical entrance requirements. At the same time, female enlistment was discouraged further by the fact that women in the military were accorded fewer training and advancement opportunities. *See* 415 F. Supp. at 489-490 (App. 200). All of this *de jure* discrimination against women is incorporated wholesale by the veterans' preference statute into the "entirely different sphere of public employment where male preference is not only not the rule but is constitutionally impermissible." 451 F. Supp. at 151 (App. 267). *See generally*, Comment, "Veterans' Public Employment Preference as Sex Discrimination," 90 *Harv. L. Rev.* 805, 811-812 (1977).

Since the Commonwealth's selection criterion extends the *de jure* discrimination of the military into the area of public employment, it is inherently non-neutral with respect to gender. Rather, as the district court found, the Commonwealth's extreme form of preference is "anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women." 415 F. Supp. at 495 (App. 212). This is because women were by law denied an equal opportunity to become veterans. 415 F. Supp. at 489-490 (App. 199-201). Thus, the statute prefers a class which by operation of law is 98 per cent male. Moreover, the preferred group —

veterans — is a closed class because only veterans who have served during wartime are eligible for the preference. For all these reasons, as Judge Campbell concluded, the “neutrality” of the statute

“is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and ‘built-in’.” 451 F. Supp. at 151 (App. 268).<sup>40</sup>

The Commonwealth controls, and is responsible for, the employment selection standards and procedures in its civil service system. Its choices are intentional. When it deliberately makes the sexually non-neutral status of veteran a necessary condition of employment, it intentionally and purposefully bars women from upper-level civil service jobs. The defendants’ argument that the Commonwealth is not responsible

<sup>40</sup> The district court also noted a second aspect of the statute’s inherent non-neutrality that shows a purposeful discrimination. Unlike the selection criterion in *Davis*, which was “designed to serve neutral ends,” *Washington v. Davis*, *supra*, 426 U.S. at 248, the district court found that the absolute and permanent form of veterans’ preference is:

“a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts women.”

451 F. Supp. at 146 (App. 256). An avowed and express objective to prefer a particular group to the predominant exclusion of another group is the antithesis of neutrality. The decision to prefer absolutely an established male class is *a priori* a non-neutral decision with respect to women which raises the “. . . serious problems of justice connected with the idea of preference itself.” *Regents of University of California v. Bakke*, \_\_\_\_ U.S. \_\_\_\_, 98 S. Ct. 2733, 2752-53 (1978) (opinion of Powell, J.).

for discrimination against women by the military services<sup>41</sup> misses the point. The Commonwealth is responsible for its decision to incorporate veteran status as the non-neutral operative criterion for selection in the civil service system. This decision makes the resulting discrimination against women purposeful and intentional. See *Washington v. Davis*, *supra*, 426 U.S. at 241; see also *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972) (“ . . . [T]he selection procedures themselves were not racially neutral.”).

Defendants emphasize that the veterans’ preference statute is “facially neutral.” See Brief for the Appellants, pp. 32-37. However, the gender-based nature of the classification need not “be express or appear on the face of the statute.” *Washington v. Davis*, *supra*, 426 U.S. at 241. The mere “facial” neutrality of a statute is not determinative, if its structure

<sup>41</sup> Brief for the Appellants, p. 35. Contrary to the defendants’ assertion, as a matter of historical fact, the Commonwealth is partially responsible for discrimination against women by the military services. The Commonwealth directly controls membership in its militia and national guard units, veterans of which may qualify for the civil service preference. Mass. Gen. Laws c. 33, § 2 states that the “militia of the commonwealth shall consist of all able-bodied male citizens . . .” but requires women wishing to serve to apply for membership. More significantly, Mass. Gen. Laws c. 33, § 11, which provides for the composition of the national guard of the Commonwealth, adopts all pertinent federal laws and Department of Defense regulations, including federal enlistment requirements. The Commonwealth has thus directly incorporated all the federal laws and regulations which intentionally exclude women, for which it now denies responsibility, into its own admission practices for state units. In addition, by operation of law, 32 U.S.C. § 325, the state units become part of the federal military forces when such units are mobilized during time of war, as they were during World War II and the Korean War. See [1946] National Guard Bureau, Ann. Rep. of Chief 163-165, 216, 222, 224, 239, 241-242, 259; [1940-1941] National Guard Bureau, Induction of the National Guard of U.S. 3-6, 8, 11 (World War II); [1950-1956] National Guard Bureau, Induction and Release of Army National Guard Units 59 (Korea). Veterans who served in the national guard units on active duty during these periods are eligible for Massachusetts’ absolute preference. Mass. Gen. Laws c. 31, § 23; c. 4, § 7, cl. 43.

necessarily produces discrimination. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956) ("But a law nondiscriminatory on its face may be grossly discriminatory in its operation."); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) ("Constitutional rights would be of little value if they could be thus indirectly denied."); *Guinn v. United States*, 238 U.S. 347 (1915). Deliberate and intentional legislative classifications which cause invidious and unequal treatment of a protected class are no less invidious because they are superficially neutral. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971) ("[A]n assignment plan is not acceptable simply because it appears to be neutral."); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) ("Therefore, we view the alleged equality as superficial. Race is the factor upon which the statute operates . . ."); *Goss v. Board of Education*, 373 U.S. 683, 688 (1963) ("The alleged equality — which we view as only superficial — . . . does not save the plans.").<sup>42</sup>

<sup>42</sup> Nor does this Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), hold that heightened judicial scrutiny may not be applied to any statute that appears neutral with respect to gender. *Aiello*, which held that the failure of California's employee-funded sickness and disability plan to provide benefits in cases of normal pregnancy did not discriminate on the basis of sex, differs from this case in a number of crucial respects. See 415 F. Supp. at 495 n.8 (App. 212); Fleming & Shanor, "Veterans' Preferences in Public Employment: Unconstitutional Gender-Discrimination?", 26 *Emory L.J.* 13, 30-33 (1977). First, the insurance plan did not effectively exclude women from benefit eligibility; women as well as men obtained significant benefits. See *Geduldig v. Aiello*, *supra*, 417 U.S. at 496 n.20. Under the veterans' preference formula, by contrast, women are effectively excluded from upper-level civil service positions. Second, the insurance plan did not discriminate "against any definable group or class in terms of the aggregate risk protection derived by that class from the program," *id.* at 496; indeed, the insurance plan in *Aiello* actually provided women with greater benefits than men. *Id.* at 497 n.21. By contrast, the veterans' preference statute clearly imposes a disproportionate burden on women. See 451 F. Supp. at 148-149 (App. 262-

These decisions do not simply analyze statutory language in a vacuum; rather, they review challenged statutes in light of both historical facts and contemporary reality to determine if the statutes, by their structure and design, discriminate against an identifiable group. For example, this Court has invalidated superficially neutral "grandfather" clauses in voting rights cases, recognizing that there exist "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

What appears neutral should not mask what by its inherently non-neutral structure and design constitutes a purposeful and intentional exclusion of women. The veterans' preference statute incorporates the *de jure* discriminatory hiring policies of the military services into the selection procedures for competitive civil service positions. The resulting effects are not accidental; they could be no more purposeful and deliberate if the statute on its face imposed a 2% quota for women on upper-level positions.

#### B. *The Inevitability of the Exclusionary Impact Demonstrates a Deliberate and Intentional Discrimination Against Women.*

In addition to concluding that the preference constitutes a non-neutral, discriminatory selection criterion, the district

264); 415 F. Supp. at 497-498 (App. 216-219). Third, *Aiello* involved a necessary effort to set priorities in dispensing the limited resources of a social insurance program. See 415 F. Supp. at 495 n.8 (App. 212). By contrast, this case involves a program which aids veterans "at the absolute and permanent disadvantage of" women, 415 F. Supp. at 496 (App. 213); 451 F. Supp. at 146 (App. 256), despite the existence of less drastic alternatives which would not deprive women of opportunities for public employment in Massachusetts. Finally, *Aiello* essentially involved social welfare legislation, while this case involves the interest of women in a fair opportunity for public employment. Cf. *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (recognizing a "federal constitutional right to be considered for public service without the burden of invidious discriminatory disqualifications").

court found that the Commonwealth's use of an absolute and permanent form of preference *inevitably* excludes women from upper-level civil service positions and produces a sex-segregated workforce. Thus, as the district court noted: "The course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state." 451 F. Supp. at 150 (App. 264).

Without regard to the individual qualifications of female applicants, Massachusetts has chosen "a preference so absolute that all women, except the very few who are veterans, are effectively and permanently barred from all areas of civil service employment not shunned by men." 415 F. Supp. at 501 (App. 226) (Campbell, J., concurring). Since the Commonwealth has adopted an absolute and permanent form of preference which "replaces testing as the criterion for determining which eligibles will be placed at the top of the list," 415 F. Supp. at 489 (App. 198), the "veteran" criterion inevitably and inexorably excludes women whenever they compete with men.

Furthermore, the legislative history of the statute demonstrates that the Massachusetts legislature knew that an absolute preference would inevitably bar virtually all women from any positions sought by men. This is why the legislature felt it necessary to "protect" jobs "especially calling for women" from the operation of the preference. See pp. 16 to 19, *supra*; 451 F. Supp. at 148 n.9 (App. 260).

The district court reasoned that since the result of excluding women was inevitable at the time the veterans' preference statute was adopted, the legislature must have intended this result as much as it intended the result of benefiting veterans. As Judge Campbell explained:

"This same inevitability of exclusionary impact upon women also undermines the argument of no discriminatory intent. There is a difference between goals and in-

tent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?"

451 F. Supp. at 151 (App. 268) (Campbell, J., concurring).

The rule that an actor intends all the inevitable consequences of his actions is one of the most basic in all of the common law, both civil and criminal. See, e.g., Holmes, "Privilege, Malice and Intent," 8 *Harv. L. Rev.* 1 (1894); American Law Institute, *Restatement (Second) of Torts* § 8A<sup>43</sup> (1965). As one authority has succinctly explained:

"[s]tated in terms of a formula: Intended consequences include those which (a) represent the very purpose for which an act is done (regardless of likelihood of occur-

---

<sup>43</sup> Comment B to this section states:

"All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500."

rence), or (b) are known to be substantially certain to result (regardless of desire)."

Perkins, "A Rationale of Mens Rea," 52 *Harv. L. Rev.* 905, 911 (1939). This rule is based on a fundamental substantive judgment that there is no substantial difference, for purposes of assigning legal responsibility for the consequences of an act, between a subjective desire to achieve a harm from one's act, and a complete disregard as to whether the harm results or not. 1 Bishop, *Criminal Law* § 20 (9th ed. 1939).

The rule that decisionmakers intend, and consequently are accountable for, the inevitable and necessary consequences of their actions has been applied by this Court in numerous contexts where, as here, a showing of intent to achieve a particular consequence is required. Thus, the rule has been applied in school desegregation cases under the Fourteenth Amendment ever since the Court announced the principle in *Goss v. Board of Education*, 373 U.S. 683 (1963), that:

"[N]o official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." *Id.* at 689.

The same rule was applied again in *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968), where the Court found that a superficially neutral "free transfer" plan operated to allow segregation and that such an "inevitable consequence," *id.* at 459, was sufficient to hold the state accountable for its action. Similarly, in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in other respects, *Monell v. Department of Social Services*, \_\_\_ U.S. \_\_\_, 98 S. Ct. 2018 (1978), this Court held that the civil rights statute, 42 U.S.C. § 1983,

"should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."<sup>44</sup> See also *Washington v. Davis*, *supra*, 426 U.S. at 254-255 (Stevens, J., concurring).

Following *Washington v. Davis*, *supra*, the various courts of appeals and district courts have also analyzed objective circumstances to determine whether discriminatory intent was sufficiently demonstrated by showing that the unequal effects were the inevitable, natural or substantially certain result of governmental action. See *United States v. School District of Omaha*, 565 F. 2d 127, 128 (8th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Arthur v. Nyquist*, 573 F. 2d 134, 142-143 (2d Cir.), *cert. denied sub nom. Manch v. Arthur*, No. 78-30 (Oct. 2, 1978); *N.A.A.C.P. v. Lansing Board of Education*, 559 F. 2d 1042, 1046-1048 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977); *United States v. Texas Education Agency*, 579 F. 2d 910, 913-914 (5th Cir. 1978); *Armstrong v. O'Connell*, 451 F. Supp. 817 (E.D. Wis. 1978); see also Note, "Proof of Racially Discriminatory Purpose under the Equal Protection Clause: *Washington v. Davis*, *Arlington Heights, Mt.*

<sup>44</sup>In addition, the Court has applied the rule that an actor intends those consequences that are inevitably or substantially certain to result from the chosen action in all contexts in which an intent to cause discrimination or some other result is a necessary part of the proof. Thus, in cases arising under § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which prohibits discrimination for the purpose or with the intent of discouraging union activities, the Court has consistently held that the requisite intent can be established by proof that the employer knew that his actions were virtually certain to cause the discriminatory result. See, e.g., *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44-47 (1954). Similarly, in the context of criminal law, this Court has recognized the sufficiency of proving intent by showing that the consequences necessarily stemmed from the actor's chosen conduct. See *Cramer v. United States*, 325 U.S. 1, 31 (1945); *United States v. Murdock*, 290 U.S. 389, 394-395 (1933); *United States v. Patten*, 226 U.S. 525, 539 (1913); and *Agnew v. United States*, 165 U.S. 36, 50 (1897).

*Healthy*, and *Williamsburgh*," 12 *Harv. C.R. — C.L. L. Rev.* 725 (1977); Note, "Intent to Segregate: The Omaha Presumption," 44 *Geo. Wash. L. Rev.* 775 (1976).<sup>45</sup>

Moreover, application of the rule that a decisionmaker intends all the inevitable consequences of his act is particularly appropriate in sex discrimination cases. This is because the most pervasive form of invidious sex discrimination, as recognized by this Court, is not a conscious desire or an ultimate objective to harm women, but rather overbroad generalizations and misconceptions about the "suitable" roles for women in society. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Craig v. Boren*, 429 U.S. 190, 198-199 (1976). While such discrimination may at times lead to explicit sex classifications, it may also lead, as here, to statutory classifications which, while not expressly referring to gender, were obviously enacted in complete disregard of the legitimate interests of women. It would simply make no sense to apply one level of scrutiny to the former type of classification on the ground that an intent to discriminate against women was present, and a different level of scrutiny to the latter type of classification on the ground that it was not.

Additionally, a rule that an actor intends all the inevitable consequences of his act is sufficiently strict — dependent, as it is, on proof that the result in question was substantially certain to occur or was inevitable — that its application in cases aris-

<sup>45</sup> The decisions cited in the Brief for the Appellants, p. 46, i.e., *United States v. City of Chicago*, 549 F. 2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), and *Guardian Association of New York City Police Department v. Civil Service Commission*, 431 F. Supp. 526 (S.D. N.Y.), *vacated and remanded*, 562 F. 2d 38 (2d Cir. 1977), are clearly not to the contrary. Those cases were identical to *Washington v. Davis*, *supra*, in that they involved the use of tests which were racially neutral and did not in any sense inevitably exclude blacks or other minorities. Thus, there was no occasion for the courts to consider the "inevitable consequences" rule as here discussed.

ing under the Equal Protection Clause will not lead to the wholesale invalidation of statutes or other official acts, which was the principal concern articulated by this Court in *Washington v. Davis*. See 426 U.S. at 248 n.14. Rather, the rule is properly applied only where, as here, the legislature has adopted a classification which, while not explicitly saying so on its face, "inevitably" or "inescapably" excludes a particular class of persons. Under these circumstances, the district court properly concluded that the exclusion of women was an intended and purposeful result of the chosen form of preference.

## II. DISCRIMINATORY ASSUMPTIONS ABOUT THE ROLE OF WOMEN SUBSTANTIALLY AFFECTED THE LEGISLATORS' DECISION TO ADOPT AN ABSOLUTE AND PERMANENT FORM OF VETERANS' PREFERENCE.

The district court's analysis of all the "objective evidence"<sup>46</sup> showed that the systematic exclusion of women when they compete with men for upper-level positions inevitably resulted from the operation of a non-neutral selection criterion that incorporates the *de jure* sex discrimination by the military services. This was sufficient by itself to establish the requisite purposeful and intentional nature of the state's treatment of women. However, even if such objective evidence were lacking, intentional discrimination could be established by evidence that discriminatory perceptions of and assumptions concerning women affected the subjective state of mind of legislators during the decisionmaking process.<sup>47</sup> *Arlington Heights v.*

<sup>46</sup> *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 421 (1977) (Stevens, J., concurring).

<sup>47</sup> The defendants erroneously argue that *Arlington Heights* requires the plaintiff to prove "that the statute was motivated by an anti-female animus," Jurisdictional Statement, p. 16, or "by a desire to harm women." Brief for

*Metropolitan Housing Corp.*, 429 U.S. 252, 265-267 (1977). This Court's approval in *Arlington Heights* of the use of such an inquiry recognizes that "numerous competing considerations" are involved in the deliberations of legislators but confirms that impermissible class-related distinctions are not a proper influencing factor in legislative decisionmaking.<sup>48</sup> See *Arlington Heights v. Metropolitan Housing Corp.*, *supra*, at 265.<sup>49</sup>

Thus, it is relevant whether the legislators, in adopting and maintaining an absolute and permanent form of preference, were influenced by "'archaic and overbroad' generalizations,"

---

the Appellants, p. 41. It is simply not the law that proof of "purposeful" or "intentional" discrimination against a particular class necessitates evidence of a conscious subjective "malice" or "ill will." The defendants have not pointed to, and the plaintiff has not found, any decision by this Court holding that proof of "purposeful" and "intentional" discrimination requires proof of a malicious, odious or an "anti-female" state of mind. "It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue." See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 94 (1973) (Marshall, J., dissenting). Sex discrimination is decisionmaking that is premised upon and caused by impermissible generalizations about the role of women in society that is often rationalized in the form of "protecting" women. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977).

<sup>48</sup> The operation of class-related distinctions, such as stereotypes about women or minorities, upon the decisionmakers does not even have to be a conscious influence. In *Hernandez v. Texas*, 347 U.S. 475 (1954), for example, this Court found an intent or purpose to discriminate from an analysis of objective evidence of systematic exclusion of minorities from juries. Despite the testimony of the defendant jury commissioners that "their only objective had been to select those whom they thought were best qualified," *id.* at 481, the Court concluded that the "result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Id.* at 482. See also *Alexander v. Louisiana*, *supra*, 405 U.S. at 632.

<sup>49</sup> The Court's decision in *Arlington Heights* in part reflected the analysis in Professor Brest's article on legislative motivation wherein he defines analysis of "motivation" as "the inquiry to determine whether impermissible criteria or objectives played a role in the decisionmaking process . . ." Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 *Sup. Ct. Rev.* 95, 115.

*Craig v. Boren*, 429 U.S. 190, 198 (1976), about the role of women or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Id.* at 198-199. Proof that a legislature chose a classification that is premised upon or serves the "purpose of fostering 'old notions' of role typing," *id.*, 429 U.S. at 198, is proof of purposeful sex discrimination.<sup>50</sup> See *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977). The available evidence demonstrates that the legislators were substantially affected by discriminatory stereotypes and traditional ways of thinking about women. As a result, the legislative choice of an extreme and absolute preference was influenced and tainted by unlawful considerations in the form of discriminatory attitudes about women.

#### A. *The Inference from the Historical Background of the Legislation.*

"The historical background of the decision is one evidentiary source . . .," *Arlington Heights*, 429 U.S. at 267, from which to infer that discriminatory attitudes affected the decisionmaking process.

The absolute veterans' preference was originally enacted in 1896 at a time when legislators, like other members of society, almost certainly presumed that women were inferior to males and had a negligible or subordinate place in the job market. Thus, as this Court has noted:

"[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave

---

<sup>50</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644 (1975) ("[T]he framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children.'").

codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . [A]lthough blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself 'preservative of other basic civil and political rights' — until adoption of the Nineteenth Amendment half a century later."

*Frontiero v. Richardson*, *supra*, 411 U.S. at 685 (citations omitted). See also *Califano v. Goldfarb*, *supra*, 430 U.S. at 223 (Stevens, J., concurring) (recognizing "the 19th century presumption that females are inferior to males"). An attitude that females were inferior was "expressly recognized in the literature of the 19th century," *Califano v. Goldfarb*, 430 U.S. at 223 n.10 (Stevens, J., concurring), and in its jurisprudence, as reflected by the concurring opinion of Mr. Justice Bradley in *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872):

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . ."

The view that women by virtue of their sex were suited only for certain types of jobs was also clearly reflected in the Massachusetts court decisions of the time. Indeed, in an 1896 opinion, *Brown v. Russell*, 166 Mass. 14, 17 (1896), the Supreme Judicial Court reviewed an early form of preference for veterans and noted:

"When women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done."

There can be no doubt that the decisions of the Commonwealth's 19th century legislators were also affected and influenced by this prevailing attitude of female inferiority when they first considered and adopted the absolute and permanent form of veterans' preference.<sup>51</sup>

#### B. *The Inference from the Legislative and Administrative History.*

An analysis of the legislative and administrative history of the preference also demonstrates that the legislators who enacted and reenacted the absolute and permanent form of preference were strongly influenced by gender-based distinctions and stereotypic assumptions about the role of women.

The first inference that the decisionmaking process was affected by stereotypes about women is provided by examining the specific legislative decisions — the statutes — to ascertain whether gender-related distinctions are expressly set forth in the legislation.<sup>52</sup> See, e.g., *Hunter v. Erickson*, 393 U.S. 385,

<sup>51</sup> See also Fleming & Shanor, "Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination," 26 *Emory L.J.* 13, 43 (1977) ("It seems probable that most legislators who drafted early extreme veterans' preference statutes, if asked why they could permit the employment discrimination against women which would inevitably result from such a statute, would respond that women belonged in the home and that, like military jobs, upper echelon civil service jobs should be held by men.").

<sup>52</sup> In order to understand the factors that influenced the legislators, it is necessary to examine the series of actual decisions in the form of specific statutory enactments rather than merely to review the current codification of the general law in Mass. Gen. Laws c. 31.

389 (1969). The present form of absolute preference was first adopted as Chapter 517 of the Acts of 1896. Subsequently, apart from simply expanding the definition of "veteran" or general recodifications, there were two substantive legislative acts reaffirming the choice of an absolute and permanent form of preference: Chapter 150 of the Acts of 1919, and the most recent decision set forth in Chapter 627 of the Acts of 1954. An examination of these statutes reveals explicit distinctions on the basis of gender, which were premised upon and fostered the stereotype that women should occupy only lower-level civil service jobs.

As conceded by the defendants,<sup>53</sup> the most recent reaffirmance of the absolute and permanent form of preference, and consequently the legislative act presently depriving the plaintiff and other women in the Commonwealth of access to upper-level civil service positions, is § 5 of Chapter 627 of the Acts of 1954. Mass. St. 1954, c. 627, § 5. This section on its face makes it clear that the legislators intended that men and women were to be treated differently and supports the inference that the legislation was premised upon traditional assumptions about the appropriate types of employment for women. Thus, the section provides that:

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: —

"(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of

<sup>53</sup> See Brief for the Appellants, p. 24.

their respective standing. *Upon receipt of a requisition not especially calling for women*, names shall be certified from such lists according to the method of certification prescribed by the civil service rules applying to civilians."

Mass. St. 1954, c. 627, § 5 (emphasis added).

The provision in the statute referring to "a requisition not especially calling for women" is, as the defendants admit, a reference "to special requisition lists classified along lines of gender" which constituted "disparate treatment of similarly situated males and females in the civil service system." Brief for the Appellants, p. 24, n.22. As the district court noted, this policy "operated only to preserve stereotypically 'female' clerical jobs for women." 451 F. Supp. at 148, n.9 (App. 260-261). The statute on its face shows that the legislators knew and intended that the extreme form of preference would freeze out women whenever they competed with men for jobs unless an exception was made to shield them in particular jobs. The fact that the legislators in the very statute that reaffirmed a policy of absolute preference included the policy of segregating certain "female" job classifications demonstrates that they were influenced by the outdated assumption that women would not, or should not, compete with men for most positions.

The 1971 amendment to the preference law accomplished by Mass. St. 1971, c. 219, merely eliminated the mechanism for separate requisitioning for "female" jobs and did not, in any respect, constitute a retroactive nullification of the 1954 and earlier policy decisions<sup>54</sup> which were influenced by and

<sup>54</sup> The original statute in 1896 and the substantive reenactment in 1919 also each contained a similar explicit distinction based on sex reflecting the legislators' view of the appropriate jobs for women. The 1896 legislative decision stated: "But nothing herein contained shall be construed to prevent

premised upon the stereotypic assumptions about the appropriate types of jobs for women. While the 1971 legislators removed one obvious sex-discriminatory aspect of the statute designed to "protect" certain jobs for women, they merely struck the offending language without modifying the extreme form of preference which, by its non-neutral structure, inevitably excludes women whenever they compete with men for civil service jobs. Thus, as the district court recognized, the 1971 amendment "did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula." *Id.* at 148 n.9 (App. 260).

The policy of separately recruiting and requisitioning on the basis of gender was, in fact and practice, an integral part of the employment practices of the Commonwealth for about 70 years. The legislature continued to authorize the practice in 1965 when it passed Mass. St. 1965, c. 53, which in part provided that examinations to establish a list for appointments could "be restricted either to male persons or to female persons," and which cut back on the practice only on promotional lists. See Mass. Gen. Laws c. 31, § 2A(e), prior to its amendment by Mass. St. 1971, c. 221.

The administrative history also shows that the Commonwealth consistently used the separate requisition system to discriminate against female job seekers and to limit job openings to male applicants. Exhibits 64-79, which are six notices for counsel jobs and ten notices for administrative assistant jobs,

---

the certification and employment of women." Mass. Acts and Resolves (1896) c. 517, § 2. The 1919 legislative decision stated that the absolute preference would apply "upon receipt of a requisition not especially calling for women . . ." Mass. Gen. Acts (1919) c. 150, § 2.

demonstrate this practice: each expressly invites only "male" candidates to take the examination.<sup>55</sup>

As this Court noted in *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 207-208 (1973), "a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder." Applying this principle to the present case, the fact that the recruiting and requisitioning policy and practice of the Commonwealth for approximately 70 years indisputably was based on intentional sex discrimination provides the strong inference that the extreme absolute preference policy was based on similar impermissible gender-related considerations.<sup>56</sup>

Furthermore, as this Court has also noted, a "series of official actions," see *Arlington Heights, supra*, 429 U.S. at 267, based on gender-related distinctions can raise an inference of ongoing discriminatory intent:

"This is merely an application of the well-settled evidentiary principle that 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as re-

---

<sup>55</sup>For example, the 1961 notice of examination for an Administrative Assistant position, Exhibit 67, stated: "Vacancies: From time to time, for males." The 1961 notice for a Head Administrative Assistant position, Exhibit 66, stated: "Vacancies: At present there is one vacancy for a male . . ." A 1963 notice for a Tax Counsel and a 1962 notice for a position as Attorney, Exhibits 64 and 65, each stated: "At present there is one vacancy for a male, to be filled on a permanent basis."

<sup>56</sup>As this Court explained in *Keyes*:

". . . [T]here is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system." 413 U.S. at 208.

ducing the possibility that the act in question was done with innocent intent.'"

*Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. at 207 (quoting 2 J. Wigmore, *Evidence* 200 (3d ed. 1940)).<sup>57</sup>

In the present case, the evidence showed that legislature after legislature continued to authorize the practice of sex-specific recruiting and requisitioning. See, e.g., Mass. St. 1896, c. 517; Mass. St. 1919, c. 150, § 2; Mass. St. 1945, c. 725, § 2(e); Mass. St. 1954, c. 627, § 5; Mass. St. 1965, c. 53. These distinctions by sex were also reflected in the rules and reports of the Civil Service Commission which in early years spoke only in terms of "clerical positions" for women.<sup>58</sup> See *supra*, pp. 16-19. Year after year, for job after job, the Division of Civil Service recruited and requisitioned based on vacancies in "male" jobs and vacancies in "female" jobs. See, e.g., Exhibits 64-79.

Moreover, when this action began in 1975, civil service law reflected other express sex-related distinctions. For example, Mass. Gen. Laws c. 31, § 23B, as amended by St. 1974, c. 835, § 109, provided for an absolute civil service preference to "the

<sup>57</sup> Sometimes this principle is referred to as the "*Keyes* presumption of continuity of intent within an institution." Note, "Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction," 86 *Yale L. J.* 317, n.19 (1976).

<sup>58</sup> As recently as 1972, the Civil Service Rules contained gender discrimination. See, e.g., Rule 6, Rules of the Civil Service, which stated:

"A male applicant for all other positions of inspector in the Department of Public Safety shall have reached his twenty-fifth birthday and shall not have reached his fiftieth birthday on the date of examination . . . ."

Division of Civil Service, Civil Service Laws and Rules, Form 345, 5 M-1-73-075231, at 84.

widow or widowed mother of a veteran," which was premised on the assumption that women are dependent on men. Mass. Gen. Laws c. 31, § 24, amended in 1974 and in 1975, permitted special requisitions for "young and vigorous men" to the labor service until 1977 when "men" was changed to "persons" by Mass. St. 1977, c. 815, § 2. Mass. Gen. Laws c. 31, § 5, exempted "male school traffic supervisors" from the provisions of the civil service laws, while keeping female school traffic supervisors under the civil service system.

Thus, the specific statutes enacting the extreme preference policy, the interrelated and undisputed sex-discriminatory recruiting and requisitioning policy and practices, and the consistency of intent evinced by the long history of related gender-based decisions, all provide the strong inference that the legislative decisionmakers who adopted and reenacted the extreme form of absolute and permanent preference were substantially affected by impermissible discriminatory assumptions and attitudes about the role of women in society.

### C. *The Inference from the Fact that the Massachusetts General Court has Consistently been Dominated by Male Legislators.*

The simple fact that the decisionmaking bodies that originally adopted and subsequently reenacted an absolute and permanent form of preference have been overwhelmingly dominated by males indicates that, insofar as the interests of women were even considered, perceptions concerning their appropriate employment status were based on archaic generalizations about them. The Commonwealth's legislature — the General Court — from 1883 through 1974 has been virtually an all-male group.<sup>59</sup> Indeed, no woman was in the

<sup>59</sup> The General Court consisted of a House of Representatives with 240 members and a Senate with 40 members, during the period from 1883

legislature in 1896 when the absolute form of preference was originally adopted or during the first major reenactment of this policy in 1919. During the 1954 legislative session when the absolute form of preference was most recently reenacted, only seven women were among the 280 elected members.

When, as here, a particular group dominates the decision-making process, an inference that that group will favor its own interests is fairly raised. Indeed, the "classic situation in which a 'minority group' may suffer discrimination in a community is where it is 'relegated to . . . a position of political powerlessness.'" *Castaneda v. Partida*, 430 U.S. 482, 515, n.6 (1977) (Powell, J., dissenting and quoting from *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973)). Male legislators, like all males, have also been subjected to the "socialization process of a male-dominated culture." *Kahn v. Shevin*, 416 U.S. 351, 353 (1974). Since the legislature has undergone little change and has remained a predominantly male club, the fair inference is that its members have continued to be influenced by outmoded stereotypic perceptions of women. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309, n.15 (1977), and cases cited therein; Fed. Rule Evid. 406.

---

through 1974. The members were elected every two years. For each two years, the Commonwealth has published a *Manual for the Use of the General Court* (each odd numbered year), Boston, Massachusetts, which shows that there were no women in the General Court until the 1923-1924 sessions and, through 1974, there were never more than 10 female legislators among the 280 members.

### III. THE DEFENDANTS FAILED TO REBUT THE FINDING THAT THE COMMONWEALTH'S CHOICE OF AN ABSOLUTE AND PERMANENT FORM OF PREFERENCE CONSTITUTES AN INTENTIONAL AND PURPOSEFUL DISCRIMINATION AGAINST WOMEN.

Once the plaintiff demonstrated that the absolute and permanent form of veterans' preference adopted by the Commonwealth intentionally discriminated against women, the defendants had the opportunity<sup>60</sup> to rebut this conclusion in either of two ways. First, the defendants could have attempted to show that discriminatory factors did not affect the Commonwealth's choice of this form of preference. Alternatively, they could have tried to show that the Commonwealth had undertaken such significant efforts toward increased employment opportunity for women that discrimination may either be presumed not to have existed or, assuming the absolute preference did discriminate against women, that such efforts, as a practical matter, compensated for and, thus, "cured" the exclusionary effects of the preference. The defendants, however, misunderstood the first alternative and, in any event, offered no substantial evidence as to either.

#### A. *The Defendants Misstate the Nature of the Proof Necessary to Rebut a Determination of Intentional Discrimination.*

As the district court concluded, the evidence offered by the plaintiff proved an intentional discrimination against women

---

<sup>60</sup>The suggestion in the Brief for the United States as *Amicus Curiae*, pp. 40-41, that the Commonwealth should be given another chance to rebut the proof of intentional discrimination ignores the fact that, upon remand from this Court, the district court provided defendants the opportunity to present additional evidence. As the district court noted, the defendants represented at oral argument that they did not desire to offer any such additional evidence. 451 F. Supp. at 148 n.12 (App. 262).

which shifted the burden to the Commonwealth to show that the same exclusionary preference formula would have been adopted in any event. 451 F. Supp. at 148 n.11 (App. 262); *Arlington Heights v. Metropolitan Housing Corp.*, *supra*, 429 U.S. at 271 n.21. The defendants erroneously articulate this burden, as did the dissenting district court judge,<sup>61</sup> in terms of whether the General Court would have enacted an absolute and permanent form of preference if more women had been allowed into the military services. Brief for the Appellants, p. 49. However, this question is not the appropriate inquiry. While, as the defendants point out, the Commonwealth is largely not responsible for the discrimination against women by the military,<sup>62</sup> Brief for the Appellants, p. 35, the Commonwealth's choice of the form of preference that operates to exclude women must be analyzed in light of the unalterable fact that the military *did* discriminate and women were not allowed to become veterans. Thus, the proper inquiry is whether the Commonwealth would have chosen the absolute and permanent form of preference and its inevitable exclusionary consequences, if the legislators had not been affected by the archaic stereotypic assumptions about women and their appropriate role in the working world.

The defendants offered no proof that, absent the discriminatory attitudes about women which tainted the decision-making process, the legislature would have chosen a form of preference which systematically and inevitably excludes women from upper-level jobs. Instead, the defendants simply offer the argument that the ultimate goal of the veterans' pref-

<sup>61</sup> Judge Murray framed the question as follows: "... Would the veterans' preference statute have been enacted if women were represented in the armed services in such numbers that the preference would have no discriminatory effect?" 451 F. Supp. at 156 (App. 279).

<sup>62</sup> *But see*, note 41, *supra*.

erence statute is to reward veterans. Especially where, as here, there appears a long history of related and overt discrimination (*e.g.*, the use of separate requisitions for "female" jobs), the defendants properly are held to a burden of producing "clear and convincing evidence," *Keyes v. School District No. 1, Denver, Colo.*, *supra*, 413 U.S. at 209, to rebut the finding of discriminatory intent. This burden is no more satisfied in this case by the defendants' claims that the ultimate purpose of the preference statute is legitimate, than it is in school desegregation cases in which defendants often claim, for example, that the ultimate purpose of certain student assignment policies (maintaining neighborhood schools) that result in segregated schools is legitimate. Indeed, the burden is far more substantial:

"In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions."

*Keyes v. School District No. 1, Denver, Colo.*, *supra*, 413 U.S. at 210.

In order to rebut the proof that the Commonwealth deliberately and intentionally sacrificed "the career opportunities of its women in order to benefit veterans," 451 F. Supp. at 150 (App. 265), the defendants would have had to show that the members of the General Court in choosing the absolute and permanent form of preference were unaffected by archaic stereotypes about women and traditional perceptions of women in the workforce, and, thus, that such inherently discriminatory attitudes were not a determinative factor in

adopting an extreme form of preference. The defendants made no such showing. Their failure to do so confirms the well-supported conclusion that the legislature's choice of an absolute and permanent form of preference was in substantial part caused by a discriminatory view of women and that the legislature's decision, as the district court concluded, "resulted from improper evaluation of competing considerations." 451 F. Supp. at 150 (App. 265).

*B. The Defendants Presented No Persuasive Proof of Any "Affirmative Action" that Rebutted the Finding of an Intentional and Purposeful Discrimination.*

In *Washington v. Davis*, *supra*, this Court relied in part on collateral circumstances — proof of effective affirmative steps by the District of Columbia police force to recruit minorities — to conclude that the writing test did not constitute an intentional or purposeful discrimination against minorities. The district court in this case looked for proof of such affirmative efforts by the Commonwealth toward women and found none:

"Unlike the defendants in *Davis*, the Commonwealth has not made any showing of affirmative efforts to recruit women, or of a recent rise in the percentage of women appointed to competitive civil service positions.

"While the officials in *Davis* sought 'systematically' to recruit minorities who had passed the preemployment test, the defendants here have demonstrated no attempt to mitigate the permanent and absolute impact on women of a formula that systematically excludes them

from desirable public service positions even though they have demonstrated their qualifications . . ."

451 F. Supp. at 149 (App. 263-264).

In the face of the district court's clear statement of the defendants' failure to prove efforts to recruit and hire women into upper-level positions, the defendants nonetheless assert that the "employment practices" of the state "demonstrate a pattern and practice of affirmative state action designed to guarantee equal employment opportunities for women." Brief for the Appellants, p. 50.

However, a review of the asserted "employment practices" reveals no recruitment of or other meaningful affirmative action as to women. Rather, they are only cosmetic statutory revisions that belatedly eliminated some of the more blatant sex discrimination in the civil service system or statements of general policy which, in and of themselves, do not prove that any concrete steps have been taken to ameliorate the "near blanket, permanent exclusion of all women from a major sector of employment," 415 F. Supp. at 501 (App. 226) (Campbell, J., concurring).

First, defendants implicitly admit that, for over 70 years, the Commonwealth operated a civil service system based on sex-specific requisitions for jobs, Brief for the Appellants, p. 49, and that there were numerous "gender-based distinctions in the civil service law," Brief for the Appellants, p. 49 n.37. However, they argue that the repeal in 1971 of such blatantly discriminatory aspects of the law constitutes proof of "action designed to guarantee equal employment opportunities for women." Brief for the Appellants, p. 50. The legislature's repeal of the statutory authorization for gender-specific requisitioning does not prove that the related sex discrimination embodied in the absolute form of preference is not

purposeful. Nor does it demonstrate that women are, in fact, being provided any increased opportunity for upper-level positions. Indeed, the district court correctly noted the speciousness of defendants' argument:

"Contrary to defendants' assertion, elimination of this exception [which provided that the preference would not apply to requisitions for 'female' jobs] did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula."

451 F. Supp. at 148 n.9 (App. 260).

Second, the defendants assert that the Commonwealth's ratification of the federal Equal Rights Amendment, its adoption of a similar amendment to its constitution, and a general statement by the Governor encouraging affirmative action in public employment indicate increased opportunity for women and, thus, demonstrate a lack of discriminatory intent on the part of the Commonwealth. Brief for the Appellants, pp. 49-50. However, broad statements of policy cannot nullify deliberate acts of discrimination against women, particularly when such declarations of good faith are made long after the discriminatory decisions.<sup>63</sup> Nor do general policy statements show that, in fact, any substantive affirmative action has been undertaken. The defendants have not offered, nor can they point to, any statistics or specific actions by the Commonwealth that demonstrate that any woman can now avoid the inevitable exclusionary effects of the extreme statutory

<sup>63</sup>The defendants' argument, taken to its logical conclusion, would mean that no state statute could ever be held to violate the Equal Protection Clause so long as the state had also adopted a broad statement of policy providing that discrimination was unlawful.

preference. Deservedly, declarations of a general purpose or policy not to discriminate have been given little probative weight against specific actions and policies of purposeful and intentional discrimination. See, e.g., *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); *Hernandez v. Texas*, 347 U.S. 475, 481 (1954). The defendants' general assertions of affirmative action, falling well within this category, are of no probative value in rebutting the finding of purposeful sex discrimination.

### C. *The Defendants Equate the Ultimate Goal of the Statute with Intent.*

As in the district court, the defendants point to the ultimate goal of the statute — an attempt to aid veterans — and argue that its legitimacy necessarily is conclusive as to whether the adoption of the absolute preference constitutes intentional and purposeful discrimination against women. Brief for the Appellants, p. 40; see also Brief for the United States as *Amicus Curiae*, pp. 31-32.

This argument is erroneous because it equates the "ultimate" or "dominant" purpose of an act with all of its intended consequences. Defendants blur the appropriate distinctions by implying that this Court uses the words "intent," "motive" and "purpose" interchangeably regardless of the context. Brief for the Appellants, p. 40; see also Brief for the United States as *Amicus Curiae*, p. 27. This is simply not true, and in any event, it cannot allow the defendants to avoid the conclusion that those consequences to women that the legislature deliberately accepted in the decisionmaking process were just as "intended" as the principal purpose or ultimate goal of the statute.

However, a legitimate untimate objective to aid veterans does not absolve the legislature of responsibility for the in-

evitable consequences to women that stem from its choice of the particular means — an absolute and permanent preference — by which it seeks to accomplish its goal. Defendants merely ignore those cases in which this Court, while recognizing the legitimacy of the ultimate governmental objective, nevertheless found that the choice of a particular means to achieve the objective constituted an intentional discrimination against women.

Thus, in *Reed v. Reed*, 404 U.S. 71, 76 (1971), the Court found the ultimate objective to reduce the workload on probate courts legitimate but, nonetheless, determined that the chosen means constituted a sufficiently intentional discrimination against women to be unconstitutional. Similarly, in *Califano v. Goldfarb*, 430 U.S. 199 (1977), the Court recognized that the primary purpose for the challenged statute was the legitimate desire to provide for needy families. This fact did not deter the Court from analyzing the classification itself which on its face appeared only to discriminate against men (widowers). On analysis, the Court found an intentional and purposeful discrimination against women because the classification inevitably penalized female workers and was premised upon and fostered the stereotype that women are less likely to be the primary source of support for a family. So too, in other contexts, the principal “legitimate” objective or desire of the legislature has not precluded analysis of the intended consequences that flow from the chosen means of achieving the ultimate objective. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972), where the legitimate objective of protecting the family unit did not shield the state from a review of the intentional consequences to illegitimate children that stemmed from the adopted classification.

The ultimate purpose of the preference statute is to aid veterans. The particular state action to achieve the purpose

— adoption of an absolute and permanent preference — inevitably excludes women from the classified official service. The legitimate, indeed benign, nature of the Commonwealth’s goal does not render the preference’s effects upon women anything less than deliberate and purposeful. As this Court has noted in a somewhat different context:

“The Equal Protection Clause would be a sterile promise if state involvement . . . could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.”

*Norwood v. Harrison*, 413 U.S. 455, 466-467 (1973).

#### IV. THE DISTRICT COURT PROPERLY INVOKED AND APPLIED THE STANDARD OF REVIEW FOR STATUTES THAT DISCRIMINATE AGAINST WOMEN.

The foregoing analysis clearly establishes that the adoption and use of the absolute veterans’ preference formula discriminates against women,<sup>64</sup> denying them meaningful employment opportunity in a major sector of the state’s economy by

<sup>64</sup>The defendants’ reliance on cases involving challenges by *male* non-veterans to various types of veterans’ preferences therefore is misplaced. See Brief for the Appellants, p. 52, and cases cited therein. In none of these cases did the Court consider whether the veterans’ preference discriminated against women. In *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), some of the plaintiffs were females who sought to represent a class of women who were injured by the veterans’ preference. See *id.* at 247 n.3. However, the court certified only a class of “non-veterans” and applied a rational basis test without any discussion of claims unique to the female plaintiffs. *Id.* at 248, 251. The district court in this case properly distinguished these cases in rejecting a “rational basis” test. See 415 F. Supp. at 496-497 n.11 (App. 214).

excluding them from all civil service positions for which they must compete with a substantial number of men. This exclusion perpetuates and reinforces the very type of outdated assumptions about sexual roles that the Constitution proscribes and that Massachusetts observed during the course of 70 years of single-sex requisitions. Cf. *Stanton v. Stanton*, 421 U.S. 7, 15 (1975). Women are effectively barred from positions which are traditionally "male jobs," including the upper-level positions which are the most desirable in state service. "Few, if any, females have ever been considered for the higher positions in the state Civil Service." 415 F. Supp. at 498 (App. 218). The jobs which are available to women are those shunned by men: the lower-paying, lower-grade positions, such as clerk and secretary, for which men traditionally have not applied. The statute thus operates to maintain patterns of occupational sex segregation based on traditional male and female roles.<sup>65</sup> Moreover, as discussed above, the discrimination is rooted in legislative assumptions that such roles were entirely appropriate. See pp. 37-48, *supra*.

Such statutes "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members," *Frontiero v. Richardson*, *supra*, 411 U.S. at 687, and are likely to burden women to a greater extent than is necessary to achieve the statutory purpose. In balancing the costs and benefits of various

<sup>65</sup>"Role-typing" is further reinforced by the statute because "[l]imited employment opportunities, in turn, discourage long-term work force participation and encourage dependency upon male relatives." Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of Veterans' Preference in Public Employment," 26 *Buffalo L. Rev.* 1, 54 (1977). Thus, by perpetuating these outdated stereotypes, the veterans' preference statute effects a self-fulfilling prophecy. See, e.g., L. Tribe, *American Constitutional Law* 1065 (1978); "The Supreme Court, 1974 Term," 89 *Harv. L. Rev.* 47, 100 (1975).

means of effecting the legislative objective, a legislature that operates under these archaic assumptions about women is likely to underestimate the harm to women which will result from the statute. See G. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment," 26 *Buffalo L. Rev.* 1, 38-39, 53 (1977).

Gender-based discrimination of this nature can withstand the judicial scrutiny required by the Equal Protection Clause only if it is found to "serve important governmental objectives" and to be "substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Califano v. Goldfarb*, 430 U.S. 199, 210 (1977); see "The Supreme Court, 1976 Term," 91 *Harv. L. Rev.* 70, 177 (1977). Although this standard of review was formulated in cases involving explicit gender discrimination, its application here is nonetheless appropriate. As noted above, see pp. 26-31, *supra*, the veterans' preference statute is only superficially neutral with respect to women. Because the veterans' preference formula effectively replaces testing as the criterion for determining who will be hired, 415 F. Supp. at 488-489 (App. 198), the statute adopts for all practical purposes the military's *de jure* discrimination against women. Moreover, it reflects and perpetuates the sex-role stereotypes and assumptions that have been rejected in the previous decisions of this Court. See, e.g., *Califano v. Goldfarb*, *supra*, 430 U.S. at 206-207, 210-211, 217; *Craig v. Boren*, *supra*, 429 U.S. at 198-199; *Stanton v. Stanton*, *supra*, 421 U.S. at 14; *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 645. See generally pp. 37-48, *supra*. Furthermore, the operation of the veterans' preference formula works a wholesale denial of public employment opportunities for women. Although the right to public employment is not a "fundamental interest," this Court has specifically disapproved classifications which restrict the employment opportunities "of an entire class of qualified individuals,

*Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), and has expressed particular concern for women, who have "historically suffered discrimination in employment." *Frontiero v. Richardson*, 411 U.S. 677, 689 n.23 (1973); see *Kahn v. Shevin*, *supra*, 416 U.S. at 353.

Finally, "heightened scrutiny" is appropriate for statutes that impose a legal burden on an entire class of persons without regard to individual merit or responsibility. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). Such a burden is particularly invidious because it departs from the "deeply rooted" principle that individuals should be treated on the basis of "individual merit or achievement, or at the least on factors within the control of an individual." *Board of Regents of California v. Bakke*, \_\_\_ U.S. \_\_\_, \_\_\_, 98 S. Ct. 2733, 2785 (1978) (Brennan, J., concurring and dissenting); accord, *Weber v. Aetna Casualty & Surety Co.*, *supra*. The devastating burden which the absolute veterans' preference statute imposes on women is, of course, completely unrelated to individual merit or responsibility. As the district court found, the veterans' preference formula excludes women from upper-level civil service positions "because of circumstances totally beyond their control," see 415 F. Supp. at 499 (App. 220), and despite their individual qualifications. *Id.* at 498-499 (App. 219).

The veterans' preference statute can withstand constitutional challenge only if it is substantially related to and in fact closely serves important government objectives. See, e.g., *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 648 and n.16. Thus, a two-step analysis is required. First, it is necessary to examine the objectives of the statute. Some objectives are constitutionally insufficient to justify gender-based discrimination. See, e.g., *Califano v. Goldfarb*, *supra*, 430 U.S. at 211 n.9. It is then necessary to determine whether the particular means chosen

by the state to achieve its objectives in fact "closely serves" those objectives. *Craig v. Boren*, *supra*, 429 U.S. at 200; see "The Supreme Court, 1976 Term," *supra*, 91 Harv. L. Rev. at 184. The "crucial question" is whether the statute advances the legislative objective "in a manner consistent with the command of the Equal Protection Clause," see *Reed v. Reed*, *supra*, 404 U.S. at 76, or whether it has "an unduly tenuous 'fit'" with the legislative goal, see *Craig v. Boren*, *supra*, 429 U.S. at 202. As the district court properly observed:

"It is not enough that the prime objective of the Veterans' Preference statute . . . is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational."

415 F. Supp. at 497 (App. 216).

Massachusetts asserts three interests in its attempt to justify the drastic employment preference that it has adopted: (1) assisting veterans in their readjustment to civilian life; (2) encouraging enlistment; and (3) rewarding veterans for their past service to the country. See Brief for the Appellants, p. 24. While the legitimacy of some form of assistance to veterans has long been recognized, the inquiry compelled by this Court's decisions does not end there. Careful analysis of these interests reveals that the statute simply does not serve to achieve the goals of assisting readjustment or encouraging enlistment, and that there is no convincing reason for the adoption of the absolute preference as a reward to veterans.

The state places primary emphasis on its interest in assisting veterans in their readjustment to civilian life, stressing the high unemployment rate for younger veterans, and particularly for younger minority veterans. Brief for the Appellants, p. 27. This solicitude has a hollow ring when measured

against the statute. The Massachusetts preference is permanent: an eligible veteran may use the preference repeatedly, throughout his lifetime, without regard to the date of his discharge from the armed services. The benefits of the statute are therefore available to veterans who were discharged from the military as long as 39 years ago and who clearly need no assistance in readjusting to civilian life.<sup>66</sup> But the Massachusetts preference does little for the recently-discharged veteran, especially in view of the limited number of civil service positions available. Because the statute creates a permanent preference, its principal beneficiaries are not recently discharged veterans but those who left the service ten or more years ago and whose greater experience will earn them higher examination scores than their younger counterparts.<sup>67</sup>

Moreover, the preference provides no benefits whatsoever to veterans whose skills are unsuited to the civilian job market, because it benefits only veterans who take and pass a qualifying examination. Thus, the statute provides no benefits to those veterans who would seem to be most in need of rehabilitation or readjustment assistance. Cf. *Hicklin v. Orbeck*, \_\_\_ U.S. \_\_\_, \_\_\_, 98 S. Ct. 2482, 2488-2489 (1978) (preference for "qualified" state residents not substantially related to goal of reducing unemployment).

The second asserted interest, that of encouraging enlistment in the armed services, is simply not an adequate justification for a state to exclude women from significant public employ-

<sup>66</sup>For example, the eligibility lists for the positions which Helen Feeney sought included 95 veterans for whom information concerning military discharge is available. Of these 95 veterans, 43 were discharged in the 1940s and 21 were discharged in the 1950s. (App. 106, 150-151, 169-170).

<sup>67</sup>This is dramatically illustrated by the Administrative Assistant list. Sixty-four veterans passed the examination, of whom 20 were discharged within five years of the establishment of the list (App. 150-151). Of that number, only four were ranked among the first 34 on the list.

ment opportunities. Responsibility for raising an army belongs to the federal government, U.S. Constitution, Art. I, § 8, see *Johnson v. Robison*, 415 U.S. 361 (1974), and not to the state. Cf. *Nyquist v. Mauclet*, 432 U.S. 1 (1977). Second, it is improbable that the goal of encouraging enlistment was in fact one of the "actual purposes" of the statute, *Califano v. Goldfarb*, *supra*, 430 U.S. at 212, *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 648, because the legislature has invariably extended the preference to veterans of a particular war only after that war has ended. The statute was first enacted in 1896 and extended a preference to Civil War veterans who had served more than thirty years earlier. The statute has since been amended a number of times but always to enlarge the class of eligible veterans on a retroactive basis. It is therefore wholly unlikely that the legislative objective was to encourage individuals to enlist. Third, the veterans' preference statute has no rational nexus to the goal of encouraging enlistments. There is no "convincing *factual* rationale" which suggests that such retroactive grants serve as an inducement for individuals to enlist. The defendants have adduced absolutely no evidence to suggest that even one individual ever enlisted in the armed forces because of the possibility that he might eventually be eligible for a civil service preference.

The final interest asserted by the state is that of rewarding veterans for their past service. Although this is a legitimate goal, it is unclear that it is an interest which can justify severe and pervasive discrimination against women. See *Califano v. Goldfarb*, *supra*, 430 U.S. at 211 n.9 ("justifications that suffice for nongender-based classifications . . . do not necessarily justify gender discriminations"). The district court concluded that it was not.

In assessing whether the proffered objective of rewarding veterans justified an absolute preference, the district court quite appropriately considered whether there were less drastic

alternatives which could effectively achieve that purpose. The decisions of this Court establish that the heightened scrutiny appropriate in gender discrimination cases includes consideration of the means chosen by the state to advance its stated goals. *Craig v. Boren, supra*; *Califano v. Goldfarb, supra*. The existence of less restrictive alternatives is relevant to whether the chosen legislative means is "substantially related" to the governmental objective and to whether the governmental objective is sufficiently important to justify the adverse impact of the particular means adopted by the state. See "The Supreme Court, 1976 Term," *supra*, 91 *Harv. L. Rev.* at 187. Thus, the Court has rejected legislative classifications under this heightened standard of review because of their "unduly tenuous 'fit'" with legislative purposes, *Craig v. Boren, supra*, 429 U.S. at 202, and has required that such classifications be "carefully tuned to alternative considerations." *Trimble v. Gordon*, 430 U.S. 762, 772 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976). See also, *Hicklin v. Orbeck, supra*; cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (under Title VII of the Civil Rights Act of 1964, a discriminatory selection criterion is unlawful, even if job-related, if there are other, less discriminatory selection devices that also serve an employer's legitimate interests).

The required "fit" is lacking in this case. It is, in the words of the district court, a "broad brush approach" of the grossest sort to the end of rewarding veterans for their past service. It accords a lifetime absolute employment preference to virtually every veteran who has served 90 days in the armed services in any capacity, at least one day of which was during the thirty-five years between 1940 and 1975.<sup>68</sup> Moreover, as a means of rewarding veterans, the absolute preference is perhaps one of

<sup>68</sup> 180 days of service is required for veterans of one particular era. See note, 9, *supra*.

the least efficient choices available. Only a small portion of the nearly 900,000 veterans who reside in Massachusetts have used or will use the preference.

As the district court found, "there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women." 415 F. Supp. at 499 (App. 219); *accord*, 451 F. Supp. at 150 (App. 265). In the area of public employment, veterans can be rewarded by means of a "point preference" such as the federal government and most states extend to veterans, or by means of a preference for a limited period of time.<sup>69</sup> Such limited preferences reward veterans but do not inescapably exclude the most highly qualified women from upper-level civil service positions. See 415 F. Supp. at 499 (App. 219-220); 451 F. Supp. at 151 (App. 268-269) (Campbell, J., concurring).<sup>70</sup> Contrary to the suggestion of the defendants,

<sup>69</sup> In fact, while most states and the federal government give veterans some limited preference in public employment, only four states employ a preference comparable in scope to Massachusetts' absolute and permanent preference. See 51 Pa. Cons. Stat. Ann. § 7104 (Purdon 1976); S.D. Compiled Laws Ann. § 3-3-1 (1974); Utah Code Ann. § 34-30-11 (1974); Vt. Stat. Ann. Act 20 p. 1543 (1968). See generally, Fleming & Shanor, "Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?", 26 *Emory L.J.* 13, 16-20 (1977).

<sup>70</sup> The defendants observe that, in Massachusetts, women obtained approximately 43 % of the appointments to official service positions during the period from 1963-1973, whereas women held only 32.3 % of the positions in the federal civil service. See Brief for the Appellants, pp. 54-55. However, the objection to the absolute preference is not that it excludes women from all positions, but rather that the statute excludes them from upper-level positions.

Moreover, the 43 % figure is misleading in a number of respects. First, it ignores that 56 % of the persons certified as eligible for permanent employment during the period were women. The defendants urge that the 43 % figure should be compared to the proportion of women in the workforce in Massachusetts (said to be approximately 40 %). Obviously, however, a comparison of the appointment rate to the workforce at large is not as mean-

see Brief for the Appellants, pp. 54-56, women would have fared considerably better on the 50 eligible lists in the record, Exs. 13-62, under a "five/ten" point preference system similar to the federal statute<sup>71</sup> than they did under Massachusetts' absolute preference. On 22 lists on which women were totally absent from the top three positions<sup>72</sup> under an absolute preference, they would have ranked in one or more of such places under a five/ten point preference. On 10 additional lists, women would have received higher rankings under a five/ten point preference than under an absolute preference.<sup>73</sup> *Id.*

Wholly apart from public employment, there are numerous ways in which the state can reward veterans without directly and unduly burdening women. For example, Massachusetts can and does extend monetary benefits to veterans: mustering-out bonuses, *see, e.g.*, Acts of 1973, c. 692; tax abate-

---

ingful as a comparison to the actual pool of qualified applicants available for appointment. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). Second, the 43 % figure does not reveal the proportion of civil service appointments which women would have obtained but for the veterans' preference.

<sup>71</sup> Under a "five/ten" point preference, five points are added to the civil service examination scores of most veterans; ten points are added to the scores of disabled veterans.

<sup>72</sup> As noted above, attainment of one of the top three positions on an eligible list ensures an applicant that he or she will be among the first considered for a vacancy.

<sup>73</sup> On seven of those 10 lists, the application of a five/ten point preference also would have resulted in an increased number of women among the top three positions. Moreover, on 20 lists, application of a five/ten point preference would have resulted in the same ranking of the top three applicants as a pure "merit" ranking. For example, in the list for a Day Care Development Specialist, Ex. 28, the top three examination scores were received by three female non-veterans: 86.02, 83.80 and 83.52. Under the absolute preference, these women were displaced by three non-disabled male veterans with scores of 76.34, 75.40 and 70.96. Under a five/ten point preference, by contrast, the three women would have continued to occupy the top three places on the list.

ments, *see, e.g.*, Mass. G.L. c. 59, § 5; educational benefits, *see, e.g.*, Mass. G.L. c. 69, §§ 7, 7A, 7B, 7F; burial benefits, *see, e.g.*, Mass. G.L. c. 115; special programs for needy veterans, *see, e.g.*, Mass. G.L. c. 115, c. 115A. *See generally* Blumberg, "De Facto and De Jure Sex Discrimination," *supra*, 26 *Buffalo L. Rev.* at 67-68.

Unlike these and similar statutes that distribute across the public generally the cost of benefits for veterans, the permanent, absolute preference in public employment exacts a devastating toll from a particular group — women seeking public employment — who have long been the victims of pervasive discrimination in the job market and who, "because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class." 415 F. Supp. at 499 (App. 220-221). *See* Blumberg, "De Facto and De Jure Sex Discrimination," *supra*, 26 *Buffalo L. Rev.* at 9, 71-73. As this Court has observed, it is particularly invidious to impose on a discrete class of individuals a legal burden which has no substantial relationship to their individual responsibility. *See Weber v. Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 175.

Thus, the district court properly concluded that the choice of an extreme veterans' preference, in light of the destructive effect on women's employment opportunities and the availability of less discriminatory means for rewarding veterans, violated the Equal Protection Clause.

**Conclusion.**

For the reasons stated above, the judgment and order of the district court should be affirmed.

Respectfully submitted,

RICHARD P. WARD  
STEPHEN B. PERLMAN  
ELEANOR D. ACHESON  
JOHN H. MASON  
ROPES & GRAY  
225 Franklin Street  
Boston, Massachusetts 02110  
(617) 423-6100  
JOHN REINSTEIN  
Massachusetts Civil Liberties  
Union Foundation  
68 Devonshire Street  
Boston, Massachusetts 02109  
(617) 742-8040  
*Attorneys for the Appellee*